No. 49.

Supreme Court U.
OCT 14 1898
JAMES H. McKENNEY,
Clerk

Brf. of Carlisle, Johnson & C
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Oct. 14, 1898.

No. 49.

MARTIN F. MORRIS ET AL.

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS, WILLIS, AMERICAN ICE COMPANY, THOMAS W. RILEY, BARBOUR ESTATE, GREAT FALLS ICE COMPANY, VAN RISWICK ESTATE, JOHNSON ESTATE, AND KIMMELL HEIRS, CLAIMING UNDER NOTLEY YOUNG, BETWEEN THE LONG BRIDGE AND THE ARSENAL.

CALDERON CARLISLE,
WILLIAM G. JOHNSON,
For Appellants aforesaid.

TALLMADGE A. LAMBERT,
Of Counsel.

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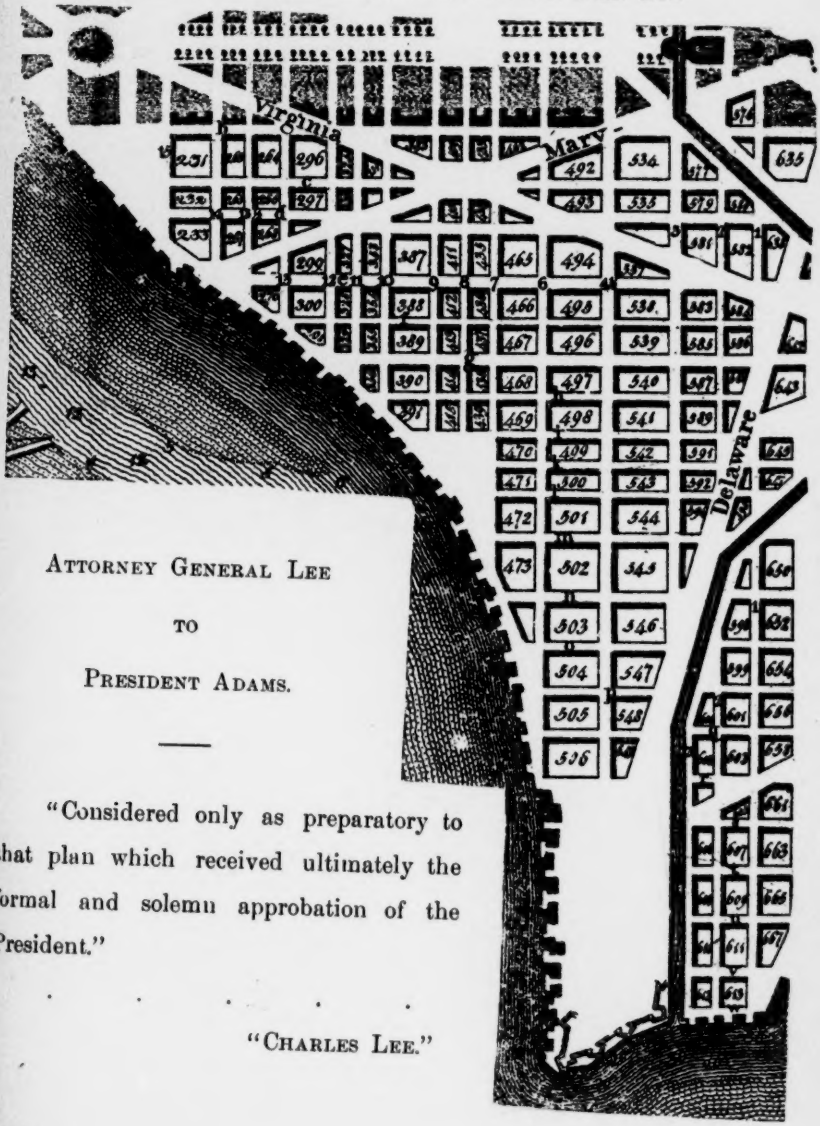
SECTION OF THE L'ENFANT PLAN—1791.

PHILADELPHIA, 20th February, 1797.

"Mr. Davidson is mistaken if he supposed that the transmission of Maj'r L'Enfant's plan of the city to Congress was the completion thereof. So far from it, . . . it was given as matter of information to show what state the business was in. . . . It remained as before under the controul of the Executive. . . .

"GEORGE WASHINGTON."

SECTION OF THE ELLICOTT OR ENGRAVED PLAN—1792.



ATTORNEY GENERAL LEE

TO

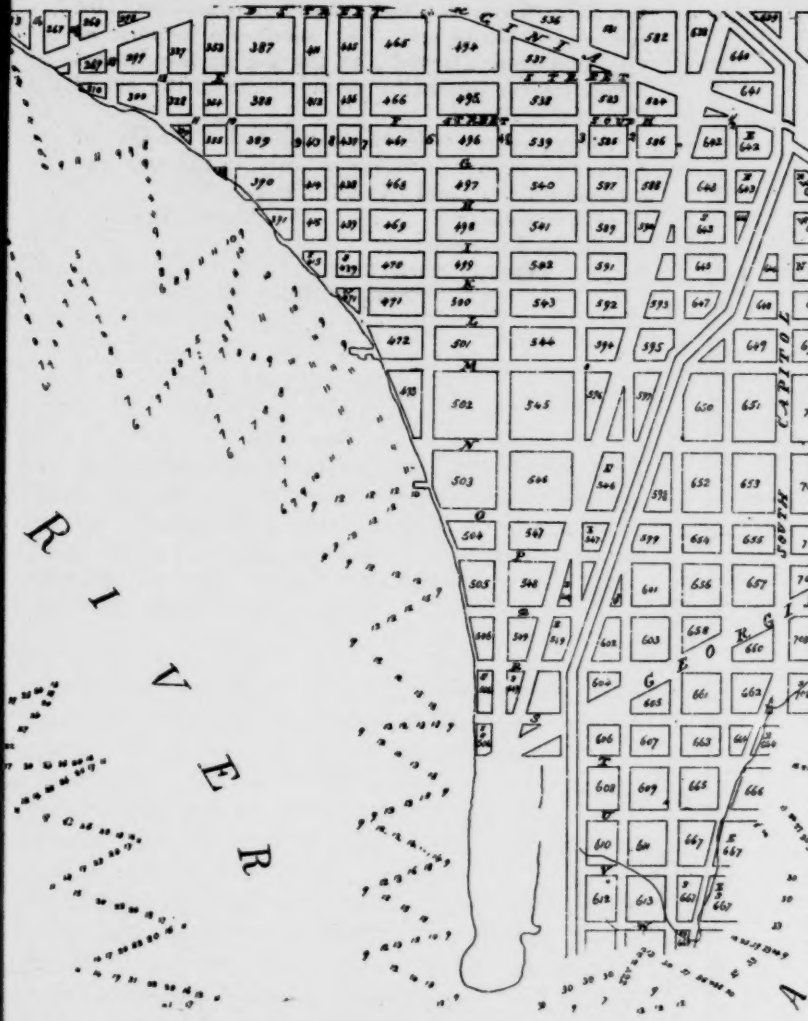
PRESIDENT ADAMS.

"Considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President."

. . . . . .

"CHARLES LEE."

SECTION OF THE DERMOTT PLAN—1797—APPROVED
PRESIDENT AD



"If this plan, under the President's signature, varies from L'Enfants or Ellicott's essays, they must each yield to it, as they are to be considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President." (Charles Lee, January 7, 1799.)

BY PRESIDENT WASHINGTON MARCH 2, 1797, AND BY
MS JULY 23, 1798.

George Washington, President of the United States of America, to Thomas Beall, of George, and John M. Gantt:

"You are hereby requested to convey all the streets in the City of Washington as they are laid out and delineated in the plan of the said city hereto

annexed, and also the several squares, parcels and lots of ground following, to wit:

[Here follows the description of the seventeen reservations by metes and bounds, with reference to the streets.]

"as the same are also laid out and delineated on the said plan to Gustavus Scott, William Thornton and Alexander White, Commissioners, etc.

. . . . . .

"Given under my hand and the seal of the United States, this second day of March, in the year one thousand seven hundred and ninety-seven.

"[SEAL OF THE U. S.]

"GEORGE WASHINGTON.

"By the President:

"TIMOTHY PICKERING,

"*Sec'y of State.*"

John Adams, President of the United States of America, to Thomas Beall, of George, and John M. Gantt:

"Whereas George Washington, late President of the United States, by his act bearing date the second day of March, in the year one thousand seven hundred and ninety-seven, did request you, the said Thomas Beall of George, and John M. Gantt, to convey all the streets in the city of Washington, as they are laid out and delineated in the plan of the said city, in the said act mentioned to be thereto annexed, and also the several squares, parcels, and lots of ground appropriated to the use of the United States, and particularly described in the said act, to Gustavus Scott, William Thornton, and Alexander White, Commissioners appointed under the act of Congress entitled 'An act for establishing the temporary and permanent seat of the Government of the United States,' the annexing of which plan was at that time omitted.

"Now know ye that I have caused the said plan to be annexed to the said act of the late President of the United States, and to this writing, and I do hereby request you, the said Thomas Beall of George, and John M. Gantt, to convey all the streets, in the said city of Washington, as they are laid out and delineated in the plan of the said city hereto an-

nexed, and all the squares, parcels, and lots of ground described in the said act of the late President of the United States as public appropriations to the said Gustavus Scott, William Thornton, and Alexander White, and their successors in office as Commissioners aforesaid to the use of the United States forever, according to the tenor of the act of Congress aforesaid.

"Given under my hand and the seal of the United States this twenty-third day of July, in the year one thousand seven hundred and ninety-eight.

"[U. S. SEAL.] "JOHN ADAMS.

"By the President:

"TIMOTHY PICKERING,

"*Sect'y of State.*"

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This cause comes here by appeal from the Supreme Court of the District of Columbia sitting in general term as a court of equity. The suit was brought in the Supreme Court of the District of Columbia by the Attorney General in the name of the United States, under the authority of the Act of Congress of August 5, 1886, and was referred to the general term, there to be heard in the first instance.

The Court of Appeals for the District having been established, and the appellate jurisdiction of the Supreme Court of the District of Columbia in general term having been abolished before the hearing, a second special Act of Congress was approved January 7, 1895, (28 St., p. 599,) confirming the jurisdiction of the court in general term, and the right of direct appeal to this court from said general term, and the cause was there heard.

INTRODUCTORY.

The case of these appellants involves the consideration of the history of the foundation of the city of Washington. The exclusive power of legislation over the District of Columbia springs from the organic law, and whatever an American legislature can do within the limits of the Federal Constitution, stripped of the difficulties of distinguishing between State and Federal powers, Congress can do in the District of Columbia.

Again, whatever power a municipality has as such over private property and right, Congress either directly or mediately through Commissioners or corporations or other agencies can exercise in the City of Washington.

But the city was wholly laid out on private property, and as this court has decided, the Government took all its property rights under the deeds in trust from the original proprietors.

The plan of the city was, by the provisions of these deeds, left to be determined by the President of the United States, and the importance of this plan was that it fixed all the rights of the original proprietors and of the United States in the lands conveyed in trust. The importance of the plan is further accentuated by the fact that the legal title to the streets and public appropriations remains to this day in the heirs of the survivor of the trustees to whom the original proprietors conveyed—and the equitable title of the United States depends wholly upon the President's request to convey the streets and public appropriations as laid out and delineated in the plan of the city thereby approved.

The trustees refused to comply with the President's request, so that to the very Capitol where this court sits the United States holds title by an equitable estoppel.

There is no judicial decision as to what was the plan of the city of Washington, within the true intent and meaning of the deeds in trust, and the question is one which has never been examined and decided by this court.

The question was not raised or considered in the case of Van Ness *vs.* The United States, 4 Peters, and the plan was not before the court.

In the Steamboat Cases, 109 U. S., the allegations of the bills, the admissions of the answers, and the arguments of counsel gave no importance to the plan, while the plan itself, though offered in evidence, was not in the record.

The complainants in those cases based their claims to riparian rights upon the contemporaneous understanding growing out of the execution of the deeds in trust, which was almost wholly by matter *in pais*. The defendants controverted this, and this court, finding no question raised as to whether the land between the squares and the river passed in fee to the United States or remained or reverted to the original proprietor, and no question as to what was the plan of the city approved by the President, held that the street or strip of land between the squares and the river did pass in fee to the United States, and with it the riparian rights.

It was erroneously assumed by Mr. Justice Story in the Van Ness case, 4 Peters, that the streets had been conveyed by the trustees to the Commissioners.

The record in this case demonstrates that the fact was otherwise.

The assumption of Mr. Justice Story was acted upon and enlarged in the decision in 109 U. S., where it was assumed that the whole tract conveyed to the trustees by the original proprietors had been by them conveyed to the Commissioners.

The record in this case demonstrates that the fact was otherwise, and that the trustees never did convey anything but the building lots.

The court, in 109 U. S., spoke of the "adopted plan" of the city of Washington, but the only plan which was ever finally adopted and approved by the President, and with reference to which the trustees were on March 2, 1797,

requested to convey the streets and public appropriations, was not before the court.

There were two preparatory plans, the L'Enfant and the Ellicott or engraved plan, and one final and conclusive plan solemnly approved by the President March 2, 1797, in a formal writing under the great seal of the United States, attested by the Secretary of State—the Dermott Map.

With the light of the present record upon the subject, not only the absolute legal rights of the United States, on the one hand, and of the original proprietors and those claiming under them on the other hand, in so far as the waterfront is concerned, but all the equitable considerations as well, must be reconsidered by this court at the suit of the United States.

The United States comes into a court of equity to establish and make clear an alleged title growing out of transactions more than a hundred years ago, with private citizens as to private property, which transactions conferred, if anything, only an equitable title to the strip in dispute—a title which the law of the land can not establish and make clear, except on the well-settled principles of equity jurisprudence, even at the suit of the sovereign.

STATEMENT.

The proceeding was by bill in equity; the original bill, answers, and other pleadings which are quite voluminous, being arranged together in Volume I, of the Record.

A large mass of oral and documentary evidence was offered, for the most part referring to the claims of the Marshall heirs and to the claims under the Kidwell patent which it will be unnecessary to consider or notice in connection with the claims of the complainant or defendants involved in the cases of these appellants.

The counsel for the United States in the court below assumed the position that all the right, title and interest claimed by these appellants were in the United States

under the decision of this court in the Steamboat Cases, 109 U. S.; and the brief of the United States disposed of them in two lines asserting that the decision in 109 U. S. controlled the whole subject. No statement either in the bill or brief disclosed the grounds of the complainant's claim to title.

Under these circumstances it seemed expedient to enter into a stipulation by which the cause was submitted as to these appellants, defendants below, without argument. No argument was made, therefore, as to the claims of these appellants in the court below, in behalf of either the United States or these appellants, and, though the court below required counsel to file a statement of their claims and contentions, it was not discussed by the court in its opinion, but the position of the counsel for the United States was adopted and confirmed (Rec., Vol. VII, p. 2542), and the decree entered in behalf of complainant (Rec., Vol. VII, p. 2549), from which these appellants appeal.

Counsel confidently expect to show to this court that the nature of this proceeding by the United States against these appellants, the character of the contentions disclosed by the pleadings, and the facts shown by the evidence, present wide distinctions between this cause and the controversy between steamboat companies reported in 109 U. S.; while the provisions of the special act of Congress under which this proceeding is brought authorize, and indeed require, this honorable court to examine this case as *res integra*.

Position of Appellants and Theory upon which they Seek Reversal of Decree.

In view of the magnitude of the Record and the large number of briefs to be considered by the court, it seems proper that counsel should state at the outset the position which the appellants assume and seek to maintain in this court.

These appellants do not deny or even question the absolute authority of the United States over the Potomac River as a navigable waterway, but expressly admit the absolute dominion of Congress therein.

They do not deny or question the absolute right of Congress, or the municipal government of this District under the authority of Congress, to regulate in what manner Congress may see fit the construction, maintenance, and use of wharves along the shores of the Potomac River in the city of Washington.

They do not deny or question the right of the United States to make any improvements or alterations in the channel, shores, or docks, which it may deem advisable for the public good.

They do not deny or question the right of the United States or the municipal government of the District, acting under their authority, to maintain and regulate as a public street in like manner as all other streets may be maintained and regulated, the existing street along the river shore known as and commonly called Water street.

They do not deny or question the absolute right of the United States to exercise wharfing and all other riparian privileges in what manner it will at the *termini* of all streets and avenues of the city which run into the river.

But they do absolutely deny that the said street known as and commonly called Water street is or ever was the property, in fee or otherwise, of the United States.

They do deny that the United States has any riparian rights or privileges as an incident to the land on which said Water street is constructed.

They affirm that said street was never laid out or delineated upon any lawful plan of the city, and was never approved as such by the President of the United States.

They affirm that, by virtue of the legitimate execution of the trusts in the deed of Notley Young to Beall and Gantt, the only source of title of the United States, the title to the land upon which said street is constructed and the shores of the Potomac River in Notley Young's land remained to him as in his first and former estate and by lawful transmission as to the land and water claimed by them has become vested in these appellants, and that he and those claiming under him have been in possession thereof ever since before the Declaration of Independence.

They affirm that the decision of this court in the Steamboat Cases (109 U. S. 672) is neither decisive of their rights nor a controlling authority upon the questions in this case, because, finally,

They affirm that the record in those cases presented a state of affairs contrary to the actual facts as clearly established by the record in this case.

Special Act of 1886.

Counsel deem it proper in this place to make a brief analysis of the special act of Congress of August 5, 1886, authorizing this proceeding.

The title of the act declares that it is

> "to provide for protecting the interest of the United States in the Potomac River flats in the District of Columbia."

The *first section* provides for the institution of a suit—

> "AGAINST all persons who MAY HAVE or pretend to have ANY right, title, claim or interest in any part of the land or water in the District of Columbia WITHIN THE LIMITS of the CITY OF WASHINGTON, or exterior to said limits and in front thereof toward the channel of the Potomac River and composing any part of the land or water affected by the improvement of the Potomac River or its flats in charge of

> the Secretary of War, FOR THE PURPOSE OF ESTABLISHING AND MAKING CLEAR THE RIGHT OF THE UNITED STATES THERETO."

Thus the title of the act declares that the United States is seeking *protection* of its interests. The mode and purpose of seeking this protection is fixed in the first section, which provides that a suit shall be instituted *against* all persons who may have or pretend to have rights, and that the purpose of this suit shall be to establish the right of the United States which is NOT ASSERTED to be ALREADY ESTABLISHED, and to make clear the right which is NOT ASSERTED to be ALREADY CLEAR.

The *second section* declares that the suit shall be "*in the nature of a Bill in Equity,*" and requires positively that—

> "*there* SHALL be made PARTIES DEFENDANT thereto all persons and corporations known to set up or assert any claim or right, and all other persons."

On the filing of said bill it is required expressly that—

> "PROCESS SHALL ISSUE AND BE SERVED ACCORDING TO THE ORDINARY COURSE OF SAID COURT UPON ALL PERSONS WITHIN THE JURISDICTION OF THE COURT;"

and public notice shall be given by advertisement to all others requiring them to appear by a day named "*to answer the said bill and set forth and maintain their right, title and interest.*" Thus the act not only requires the discovery ordinarily involved in the obligation to answer the bill, but also specifically requires all defendants to "*set forth* and *maintain, their right, title and interest.*"

By section third the court is required without limitation to proceed with all practicable expedition to a determination "OF ALL RIGHTS drawn in QUESTION" and is given—

> "FULL POWER and jurisdiction by its decree to determine every question of right, title, interest or claim arising in the premises and to vacate, annul, set aside or CONFIRM ANY CLAIM of ANY CHARACTER arising or set forth in the premises."

The just limitations of such a statute, so far as the substantial rights of parties are affected, have been announced by this court in construing a somewhat similar statute concerning transactions of and with the Union Pacific Railroad in United States *vs.* Union Pacific RR. Co., 98 U. S. 569:

> "The first suggestion of the legal mind on this inquiry is, that *it will not be presumed, unless the language of the statute imperatively requires it,* that Congress, by a retrospective law, intended to *create new rights in one party to the suit at the expense, or by an invasion of the rights, of other parties;* or where no right of action founded on past transactions existed, that Congress intended to create it (p. 606).
>
> . . . . . .
>
> "But whatever be the relief asked, it could only, by the express terms of the act, be granted to that party who was in equity thereunto entitled. *It is very plain that there was here no new right established. No new cause of equitable relief. No new rule for determining what were the rights of the parties. That was to be decided by the principles of equity; not new principles of equity, but the existing principles of equitable jurisprudence.*" (p. 607).
>
> . . . . . .
>
> "We are of opinion, therefore, that the act in question was intended *not to change the substantial rights of the parties to the suit which it authorized,* but to *provide a specific method of procedure* which, by removing restrictions on the jurisdiction, process and pleading in ordinary cases, would give a larger scope for the action of the court, and a more economical and efficient remedy than before existed" (p. 608).

The Proceedings Below.

The inevitable conclusion from the provisions of the act is that it was the intention of Congress that these defendants, all known to claim the wharves and riparian rights of which they were in open and notorious possession and enjoyment,

and all within the jurisdiction of this court, should be amongst those against whom the suit was filed, and should be made parties defendant and served according to the ordinary course of the court.

But when the bill was filed none of these appellants were made parties and no process issued or was served, according to the ordinary course of the court, except on the defendants named in the bill, and the only other process was by the order of publication. (Rec. Vol. I, p. 47.)

Objection to the validity of this process was promptly made on behalf of the defendant Harvey (Rec. Vol. I, p. 237) by counsel specially appearing for the purpose, but was overruled, and later he answered under protest.

The bill claimed title to the land and water upon and in which the wharves of these appellants are built, but the only prayer of the bill in respect to that claim of title is that the court—

> "Will proceed to ascertain and determine . . . the title to all the land and water included within the metes and bounds set out in paragraph 3 of the bill."

The oath to answers to the bill, except as to the defendants named in the fourth prayer of the bill, was not waived. (Vol. I, pp. 12, 13.) The order of publication, under which all the appellants except those named in the bill came in, required parties to appear and answer. (*Ibid.*, p. 49.) When all the answers were in, general replications were filed by the United States, but no evidence was offered tending to establish or support any right or title in the complainant, the United States, as against these appellants, or tending to disclose any grounds of claim of title, nor was any evidence offered against these appellants, defendants below, except evidence tending to show that the land and water in which the rights, titles and interests claimed by them subsisted were included by an arbitrary line, indicating the limits claimed to be affected by the improvements of the Potomac River, under the

direction of the Secretary of War. (Vol. I, pp. 244, 245, and 250.)

It was not shown and is not now claimed that a dollar of public money had been or was proposed to be expended within the area claimed by these appellants; and the bill did not assert that the land and water which they claimed was affected by the proposed improvements otherwise than by filing as an exhibit the War Department map with the said line drawn so as to include them, which map was afterwards offered in evidence.

Thereupon, the United States closed its case, and the bill being answered and the claims set forth and maintained by answers under oath on behalf of these appellants, a motion was made by the defendant Harvey, (Rec. Vol. I, pp. 243, 249), praying the court to pass a decree that the United States had not established and made clear any right, title or interest, paramount to the right, title and interest set forth and maintained in the answer of the said defendant. The complainant answered the motion admitting the facts set up to be true. (Vol. I, p. 245.)

The court in its opinion overruling this motion (Rec. Vol. I, p. 250), admitted that, under this state of evidence, in an ordinary case, the bill must be dismissed, but it so construed the special act of Congress as to hold that in this case the burthen of proof was shifted from complainants to defendants. After the overruling of the motion of Harvey for an affirmative decree in his favor the others of these appellants moved on the same grounds for a decree dismissing the bill as to them, but these motions were likewise overruled. (Rec. Vol. I, pp. 229, 230.)

Thereupon these appellants, defendants below, without waiving their objections to the case made by the complainant, but expressly insisting thereon and in entire ignorance of the claims or grounds of title of the complainant, as against them, which had not in the pleading or evidence been disclosed, offered in support of the allegations of their

answers certain oral and documentary evidence. The complainant in rebuttal closed the evidence in the case by introducing for the first time in the cause some oral and documentary evidence as to the nature and grounds of its claim of title as against these appellants and the cause then stood for final hearing.

The nature, substance and tendency of all this evidence will be considered and explained later, in the discussion of the case on its merits.

Property Claimed by Appellants and the Issue as to the Same Between the Parties.

The physical property claimed by these appellants is situated at various points along the southwestern edge of the city of Washington, on the bank of the Potomac River between the Long Bridge and the Arsenal grounds and consists of land and wharves built therefrom out to the channel of the river, as particularly described in their respective answers, to which no adverse claim is made by any party to the cause other than the complainant.

The right and title claimed by them is in fee simple with the right of wharfing, and the riparian rights and privileges incident to the ownership of land bordering upon water, subject, of course, to the *jus publici* in the river itself as a navigable waterway, and lawful municipal regulations.

The court below held that in the foundation of the city a street called Water Street was interposed between all the land of Notley Young and the Potomac river, which completely separated his land from the river and destroyed all riparian privileges and rights which might otherwise attach; that the ownership in fee of such street was in the United States, and that the riparian rights claimed to be annexed to the land of Young had passed to the United States.

On the part of the appellants it is claimed (1), that no valid title to any such intervening land as the alleged Water street ever passed to the United States; that no such

street was lawfully created in the plan of the city, but so far as it exists in fact at all, it is a space of voluntary dedication; (2) that if the alleged Water street was in fact laid out on the plan of the city or otherwise became vested in the United States, the riparian rights incident to the main land were not affected by the interposition of said street, but by the transactions of the parties passed with the lots and squares as appurtenant thereto.

Thus it will be seen that the issue involved is one of conflicting claims of title to real property in which the complainant, the United States, out of possession, seeks to establish, against the defendants, the appellants here, in possession, a paramount title to the entire water-front of the city.

It is a fact admitted by counsel for the United Statss that the complainant has never been in actual occupation of any of the land or water claimed by these appellants but that, these appellants and those through whom they claim have been in actual and continuous possession for more than a hundred years.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the burden of proof was upon these appellants to show title to the land and water claimed by them in their respective answers.

II.

The court erred in not holding that the United States had the burden of proving title in itself to the land and water claimed by it in the bill of complaint as against these appellants.

III.

The court erred in decreeing that the claims of these appellants set forth in their respective answers to any rights,

titles and interests, riparian or otherwise, in the land and water in said answers described were invalid, void and of none effect.

IV.

The court erred in decreeing that there did not exist in these appellants any right, title or interest in any part of the land or water included within the limits of the improvements of the Potomac River and its flats, as the said limits are described in the said bill of complaint adverse to the complete and paramount rights of the United States to the same.

V.

The court erred in decreeing the right and title claimed by the United States to all of the said land and water to be absolute in the said United States as against these appellants.

VI.

The court erred in not decreeing that the right, title and interest set up by these appellants respectively to the land and water described in their respective answers was a valid and complete title as against the complainant, the United States.

History of Title to Land in the City of Washington in the Notley Young Tract.

A brief chronological statement of events affecting the title to the tract of land and water within the limits of which are contained the rights and interests claimed by these appellants, will materially assist to a clear understanding of the controversy.

On the 20th of June, in the eighth year of the reign of Charles I (1632), as the court will judicially notice, the territory comprising the Province, now State, of Maryland was granted unto Caecilius Calvert, Baron of Baltimore, Ireland.

The full text of the grant is to be found under the caption, "Charter of Maryland," at the opening page of the first volume of Kilty's Laws of Maryland, and an extract appears in Vol. IV of the Record, pp. 1968–9.

In 1663, more than a century before the Declaration of Independence, three tracts, called "Duddington Manor," "New Troy" and "Duddington Pastures," were by authority of the said charter by patent granted in fee to one George Thompson. (Rec., Vol. VI, pp. 367–8.) The western boundary line of "Duddington Pasture" is the Potomac River for 960 perches.

In 1670 Thompson, in consideration of forty thousand pounds of tobacco and a rent of "one pepper corn," if demanded, leased all of this land for one thousand years to Thomas Notley. (Vol. VI, p. 370.)

In March, 1671, another patent was issued for this same land, in fee, to said Thomas Notley. This patent recites the former patent to Thompson, his entering possession and seizin thereunder, the lease to Notley, and that a question of the validity of Thompson's title existing, this patent is issued to cure any defect and assure the land to Notley. The three tracts were by this patent amalgamated and erected into a manor by the name of "Cerne Abbey Manor." (Vol. VI, pp. 370–374.) In April, 1679, "Cerne Abbey Manor" passed by devise under the will of Thomas Notley to Notley Rozier, in fee. (Vol. VI, pp. 377–8.)

In 1716, sixty years before the Declaration of Independence, another patent, based upon a resurvey of "Cerne Abbey Manor," was issued to Rozier, in fee, confirming his title and changing the name to "Duddington Manor." (Vol. VI, pp. 379–382.)

Notley Rozier married one Jane Digges, and their only child married one Daniel Carroll, and "Duddington Manor" passed by descent to Charles Carroll, and from Charles Carroll to his heir, Charles Carroll. (Vol. VII, note top of p. 2136.)

By deeds of lease and release, executed by Charles Carroll on August 17th and 18th, respectively, 1758, a tract of four hundred acres, the part of "Duddington Manor," formerly "Duddington Pastures," was conveyed to one Ann Young, widow, in fee. The western boundary is described in these deeds as "by and with the said river (Potomac) six hundred and sixty and two perches to Turkey Buzzard Point." (Vol. VI, pp. 382–384.) A map showing the survey of this manor, and showing Ann Young's portion thereof, will be found in the Record. (Vol. VI, pp. 388–389.)

In 1761, fifteen years before the declaration of Independence, Ann Young conveyed this land in fee to her son, Notley Young. In her deed the land is described as bounding "by and with the said river (Potomac) six hundred and sixty-two perches to Turkey Buzzard Point." (Vol. VI, p. 397–8.)

An admittedly correct plat of this tract will be found in the record marked Exhibit M. R. No. 5. (Vol. 1, preceding p. 325.)

This tract of Notley Young embraced all that part of the present City of Washington from and including Square 233 (Fifteenth and D streets southwest), to the Arsenal grounds. (Vol. VII, p. 2136, note, bottom of page.)

By the Declaration of Independence in 1776, the political sovereignty of Great Britain was terminted and that of the State of Maryland substituted therefor.

By the Declaration of Rights of Maryland (August, 1776) it is provided that—

> "the inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by his majesty, Charles the First, to Caecilius Calvert, Baron of Baltimore."
>
> Last clause of Section 3, Declaration of Rights, Vol. 1, Kilty's Laws of Md.

By this provision persons then claiming title to land were remitted to their original source of title and not to the Sovereignty of Maryland.

The seventh clause of the compact between Virginia and Marlyand of March 28, 1785, declared that:

> "The citizens of each State, respectively, shall have full property in the shores of the Potowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river."

In 1787 the Federal Constitution was adopted, authorizing Congress—

> "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States."

By the Act of Assembly of Maryland of December 23, 1788, the Representatives of Maryland in Congress were authorized to—

> "cede to the Congress of the United States any district in this State, not exceeding ten miles square, which the Congress may fix upon and accept for the seat of government of the United States."
>
> Vol. II, Kilty's Laws, Act 1788, Chap. XLVI.

By the act of Congress of July 16, 1790, it was provided that a District of Territory on the Potomac be accepted for the permanent seat of Government. (1 St. 130.)

By the Act of March 3, 1791, the Act of July 16, 1790, was amended so as to allow acceptance of a tract on both sides of the Potomac, but confining the erection of public buildings to the Maryland side (1 St. 214).

On March 13, 1791, Notley Young and other original proprietors of the proposed territory executed a certain instrument in writing by which they, in consideration of the Federal city being laid off on their lands, bound themselves to convey in fee, in trust to the President of the

United States or such persons as he should appoint, the whole of their lands upon certain conditions:

> 1: "The *President* shall have the *sole power* of directing the Federal city to be laid off in what manner he pleases."

2. He should retain any number of squares he may think proper for public improvements or *other public uses.*

3. The lots only which shall be laid off shall be joint property between the trustee for the public and each proprietor, and the same shall be fairly and equally divided between the public and individuals.

4. For the *streets* the proprietors shall receive no compensation.

5. For the squares or *lands in any form* which shall be taken for public buildings or ANY KIND of *public* improvements OR USES the proprietors shall receive at the rate of twenty-five pounds per acre. (Vol. 7, p. 2183.)

On June 29, 1791, Notley Young executed a deed to Beall and Gantt conveying his land in trust in accordance with the terms of the before-mentioned agreement. (Vol. V, p. 46.)

On December 13, 1791, President Washington, by a special message, transmitted to Congress the projected plan of a city made by Major L'Enfant, for the purpose of advising Congress of the state and progress of the business of forming the Federal city (Vol. V, p. 80).

On December 19, 1791, the Assembly of Maryland passed an act ceding to the United States the portion of territory selected March 30th, 1791, by proclamation of the President for the District of Columbia in that State. By the second section of that act it is provided among other things—

> "*that nothing herein contained shall be so construed as to vest in the United States any right of property in the soil as to affect the rights of individuals therein.*"
>
> 2 Kilty's Laws, 1791, chap. XLV.

In the year 1792, another projected plan of the proposed city was made by Major Ellicott which plan was engraved and generally circulated. (Vol. V, preceding p. 77.)

Therafter one James R. Dermot, a surveyor, was employed to make a plan of the proposed city and his plan was finally completed sometime before March 2, 1797, and on that day was formally and in writing approved by President Washington. (Vol. V, after p. 118; Vol. VI, pp. 152–6.)

Subsequently, because the written approval of President Washington had not been attached to the map itself, or if so, had become detached, President Adams on July 23, 1798, gave his formal and written approval to this plan of Dermott. (Vol. VI, 156–7.)

On February 27, 1801, Congress passed the act concerning the District of Columbia, providing for its government (2 St 103) providing—

> "that the laws of the State of Maryland as they now exist shall be continued in force in that part of the said District which was ceded by that State."

ARGUMENT.

The Title of the United States in the City of Washington is Not Founded in Sovereignty, but Arises Out of Coutract.

At the outset, it thus appears, that at the birth of the United States of America as a Sovereign State in the family of Nations, and when it sought and found in the State of Maryland a local habitat for the operations of Government, it encountered the private citizen in possession and legal ownership of all the soil, in the absolute dominion of a purely allodial title protected in that title and possession by the same organic law which gave being to the new sovereignty.

This situation presented a novelty in the history of the world. A sovereign State instead of conferring titles to property upon its citizens, was seeking title from them. Thus Notley Young and not the United States is the source of title to the property in controversy. The United States, complainant in this cause, is not here in any sovereign capacity, but in the capacity of a mere private claimant, under contract, entitled to such rights, and such rights only, as its contracts with its citizens gives it and claiming only in that capacity.

The importance of the foregoing lies in this; that, whereas, in an ordinary case between sovereign and subject or citizen, the title is by law in the sovereign except as shown to have lawfully passed out of it to the subject or citizen, here the position is precisely reversed and all rights are in Notley Young and those claiming under him, except such as are shown to have lawfully passed out of him or them to the sovereign.

Unless, therefore, it has been established in this case by a preponderance of competent evidence sufficient to overcome all lawful defenses of the appellants that the title of Notley Young *has* lawfully passed to the United States the decree in this case must be reversed.

It is confidently submitted that the record in this case discloses no title whatever in the United States, but that the title remains where the unbroken possession has been for more than one hundred and twenty-five years, namely, in Notely Young and those claiming directly under him.

No Title Passed to the Complainant, the United States, to a "Water-Street" or Other Street or Strip of Land in the Tract of Notley Young Along the Shore of the Potomac River.

It is of the highest importance that the mode in which the United States could acquire title to such a parcel of land should be definitely understood at the outset and constantly kept in mind in dealing with this subject.

As already shown, the United States did not acquire any land by virtue of its sovereignty over the territory in which the city was located, nor by cession from the State of Maryland, but its sole source of title is by contract under the trust deed of Notley Young to Beall and Gantt, dated June 28, 1791, recorded January 5, 1792, (Vol. V, p. 46). It is to the legitimate execution of that trust that we must look to derive title in the United States for the parcel in controversy, and to that alone.

By that deed the land of Young was conveyed for a specific purpose, and no other, viz: "to be laid out"—

> "for a Federal city, with SUCH *streets . . . as the President of the United States* for the time being *shall approve.*" (Vol. V., p. 47.)

The land could not be lawfully used for a National park, or a National farm or propagating garden, or for a penal institution or other purpose, but only for a Federal city, to be the seat of Government.

So, also, the streets could not be laid out or arranged by Notley Young or the Commissioners, or by the trustees, Beall & Gantt, or by any other persons or officials except the President. While the President might call to his aid any number of officials or private persons and receive and accept suggestions from any source, his "approval" was an absolute essential to the existence of any street, and the power of the trustees to convey land for streets was strictly limited to "*the said streets*" (Vol. V., p. 47.); that is, "*such* streets" "as the President of the United States" "shall approve."

The Powers of the Commissioners.

It is important here to note the precise limitations upon the powers and authorities of the Commissioners conferred by the acts of Congress and of the Assembly of Maryland and by the terms of the trust deed.

The second section of the act of Congress of July 20, 1790 (1 Stat. 130), created the office of Commissioners and authorized their appointment by the President.

The same section gave them power, under the direction of the President, to survey and, by proper metes and bounds, define the territory to be accepted for the permanent seat of government.

This had no reference to the City of Washington itself nor to the acquisition of any right of property in the soil, but only to the acquision of sovereignty, the exclusive right of legislation, under the Constitution.

The third section gave them power "to purchase or accept *such quantity* of land" within the District "on the eastern side of the river" "as the President shall deem proper for the use of the United States," and also required them to provide suitable buildings for the use of the Government. No other powers or authority were given them by that or any other act of Congress, and they were therefore limited in their powers and authority to three things, viz:

1. To fix by metes and bounds (with executive approval) the boundaries of the District of Columbia.

2. To purchase or accept land for the use of the United States in *quantity* to be approved by the President.

3. To provide buildings for the government according to plans to be approved by the President.

There is not one word in the act mentioning or referring to streets or a city nor any provision whatever for the creation or formation of a city.

The only authority from the Legislature of Maryland as to the city of Washington was that to license and regulate the building of wharves (Act of 1791, Ch. 45, section 12).

By the terms of the deed in trust to Beall and Gantt the powers of the Commissioners were limited with equal distinctness.

They were authorized (1) to receive and hold title to the streets and appropriations for the United States; (2) to make fair and equal division with Notley Young of the residue of the lots into which the city should be laid off, and (3) to designate and give notice as to such trees as should be left standing and not to be cut down by said Young under the reservations in his deed.

Thus it will be seen that neither by legislation nor contract was any power given to the Commissioners *to lay off or designate any street or appropriation, but that power and right was confined exclusively to the President,* and the only act of the Commissioners which could affect the title or rights of the United States or proprietors was in the division of the lots not reserved by the President.

The President, Acting Under the Trust Deed, the only Authority who Could Confer Title on the United States to a Street.

The terms of the trust deed are too plain to admit of doubt upon this point, the language being:

> "*Such streets*, squares, parcels, and lots AS THE PRESIDENT OF THE UNITED STATES for the time being SHALL APPROVE." (Vol. V, p. 47.)

By this provision the entire subject of the *plan* of the city is committed to the President. Everything that could, by any possibility, form a divisional part of a city, viz., "*streets*," "*squares*," "*parcels*," and "*lots*," were to be "*such*" as "*the President*" shall approve.

The trust then proceeds to declare that there shall be conveyed by the trustees, to the Commissioners, for the use of the United States "ALL the *said streets* and SUCH of the *said squares, parcels* and *lots* as the *President* shall deem proper." (Vol. V, p. 47).

The purpose of the deed was to provide land for a Federal city, some portions of which should become the prop-

erty of the United States. The form or plan of that city had to be fixed in some way in order to designate what parts should belong to the Government. The President was the official authority empowered to regulate those matters. He was to divide the land into "streets," "squares," "parcels" and "lots;" he was to select "such" of these "squares," "parcels" and "lots" as should become the property of the Government, while "*all*" of the "said streets" which he "approved" were to become the property of the Government.

There is not a word or suggestion in the entire deed that any other authority could affect the disposition of a foot of this land or that such an attempt would be tolerated under any circumstances.

Notley Young had the right to designate in his deed who should have power to fix the streets and other portions of his land to be given up to the United States, and when he confided that power to the President it was as much beyond the power of the Commissioners to exercise it as of any stranger to the transaction. They could not take from him for a street land which the President had not seen fit to approve, nor take from the United States and restore to him or give or sell to others land which the President had approved for a street.

On April 5, 1806, Attorney General Breckinridge uses the following language:

> "*The power of the President to establish the plan of the city is derived solely from the deeds of the proprietors. . . . The proprietors of the soil had a right to annex such conditions and limitations to their grants as they each thought proper. The President,* WHO WAS THEIR TRUSTEE, executed so far as regards the present question, his trust. He has determined the plan. He had exclusive power to do so. He has completely expended this power and it is unalterable, not only by his successors, but by Congress itself."

In order to determine, therefore, whether the title to any disputed area in Notley Young's land passed to the United

States as a "*street*," the sole inquiry is as to whether such area was "approved by the President of the United States" as a street.

It is not pretended that this approval was required to be given in any particular way, or that the fact of approval must be established by evidence different from that which would be required in any similar controversy. All that is required is that the act of approval by the President of the United States, as matter of fact should have taken place, and that competent evidence of such matter of fact should be adduced.

This we respectfully submit has not been done in this case with respect to any street running along the shore of the Potomac in Notley Young's land.

No Evidence that the President Ever Approved a Water Street, or Other Street Along the Shores of the Potomac in Notley Young's Land.

1. There is not a scintilla of evidence of the conveyance by the trustees of any street whatsoever, either approved or not by the President.

2. There is not a scintilla of evidence as to a specific approval by the President of a "Water Street" in any part of Notley Young's land by that name.

The evidence is confined to the following:

1. A plan of the city by Major L'Enfant in 1791.
2. A plan of the city by Major Ellicott in 1792.
3. The plan of the city by James R. Dermott in 1797.
4. Certain returns in June, 1793, of surveys of squares by Ellicott showing no Water street, but giving the Potomac River as the boundary.
5. Certain plats of squares, made in December, 1793, nearly four years before the Dermot map, the draftsmen of which are unknown, signed by the Commissioners and Notley Young, in March, 1797, after approval of Dermott map, stating Water street to be a boundary.

6. Plats of series of squares made by one Nicholas King in 1803, six years after the Dermot map, showing a Water street.

As to these various maps and plats there is not a scintilla of evidence that any President of the United States "approved" either formally or informally, in whole or in part, either (1) the L'Enfant map, (2) the Ellicott map, (4) the Ellicott returns of squares, (5) the plats of squares showing a water street or (6) the King plats or map.

There is overwhelming and conclusive evidence that President Washington in March, 1797, and President Adams in July, 1798, formally and in writing approved (3) the James R. Dermott map.

It would be impracticable in this brief to argue the negative proposition that the President never gave his approval to the several documents above mentioned as to which such approval is denied. If, as we doubt, counsel for the United States shall contend that any of those instruments ever did receive the approval of the President, they will indicate to this court by what evidence in this record they suppose it to be established.

We shall, however, assume the burden of showing that the President did give his approval to the Dermott map, that that approval was conclusive and exclusive of all other plans, projects or designs, and was the plan, and the only plan, by which *streets* were fixed, approved and directed to be conveyed and by no other designation than "*as laid out and delineated in*" the Dermott map.

History of the Maps of the City.

A brief history and comparison of the maps will demonstrate that the Dermot map was the only map of the city which ever received the express approval of the President of the United States.

The L'Enfant Map.

The first plan of the city was made by Major L'Enfant, a talented French engineer, of whose artistic taste and real

ability we have abundant proof, but whose connection with the work terminated by reason of his own infirmities of temper and character.

This plan clearly foreshadows all the essential features of the city of Washington as it stands to-day, but it was not complete for any purpose, unless to furnish the general artistic design. Indeed it is impossible that it should have been because it was made in 1791, sometime between the President's proclamation fixing the permanent lines of the District of Columbia in March, 1791, and December of that year, when the President sent it to Congress. But the map was afterwards withdrawn from Congress, and General Washington, in a letter of February 27, 1797, to the Commissioners (Rec. Vol. V, p. 80) admitting that many alterations had been made from the L'Enfant plan, states that—

> "Mr. Davidson is mistaken if he supposed that the transmission of Major L'Enfant's plan of the city to Congress was the completion thereof; so far from it, it would appear from the message which accompanied the same, that it was given as a matter of information only to show what state the business was in; that the return of it was requested; that neither House of Congress passed any act consequent thereupon; that it remained as before under the control of the Executive."

On the L'Enfant map the squares were unnumbered and the streets unnamed, and as we have seen, General Washington himself states that this map was not approved nor finally completed.

The Ellicott or Engraved Plan.

The Ellicott or Engraved Plan, published in Philadelphia in the following year, 1792, was a much more practical production. In the meantime the general plan of naming the streets had been settled, and Ellicott was directed to add the soundings on the river front and on the Eastern Branch.

Accordingly, in the Engraved Map we have the squares all numbered, the avenues named, and the lettered and numbered streets all designated.

But this map was in other respects incomplete, as it did not show all the squares or correctly delineate the public reservations, and was made before the completion of the surveys, none of which were returned till after April, 1793 (Vol. VI, p. 215), and without reference to the existing conditions of the river shores. This map, while it was used for some purposes and commended in many respects by General Washington, was never formally or expressly approved by him on any occasion.

General Washington's contemporaneous writings show that this map, like the L'Enfant map, was retained for revision, and, like it, to use the language of General Washington applied to the L'Enfant map, "remained as before under the control of the Executive"; or, to use the language of Attorney General Lee in 1799, speaking of both the L'Enfant and Ellicott plans, "that they are to be considered only as preparatory."

The Dermott Map.

Next in order comes the Dermot map, in 1797. This map was prepared from actual and completed surveys of the entire city, and seems to have taken nearly two years in its preparation. It was completed and approved six years after the proclamation of the President fixing the definitive boundaries of the District, and nearly six years after the conveyances by the original proprietors of the land appropriated for the city.

This map, while it follows the general design of the preceding, contains many squares which are not shown upon either the L'Enfant or Ellicott plans, and is in reality more of a surveyor's map than either of those. The soundings of the river and on the Eastern branch are given, and the shore lines of the river and Eastern branch are shown as

they actually existed by survey, running along and over most of the squares near those shores.

Indeed, while L'Enfant's map was merely a project before the lines of the District which was to contain the Federal city had been officially fixed, while Ellicott's engraved plan was hastily prepared before the surveys had been completed, the Dermot map, to which the others, in the language of Attorney General Lee, were merely "preparatory," represents the result of all the labors of the surveyors and Commissioners in a form which met the approval of the President as a completed work.

The Dermott Map the Only Plan of the City Approved by the President.

This map was the only one definitively approved by General Washington as *the* map of *the* City of Washington, as fixing the rights of the United States and of the original proprietors. And it was as "laid out and delineated in" this map that General Washington made formal request to the trustees, Beall and Gantt, to convey to the United States the streets which were not otherwise described than as laid out and delineated in said map; and it is only to this map that President Washington's description of the public reservations, carefully made by metes and bounds, and in the very order in which they are numbered today, can be applied.

President Washington's approval was dated on March 2, 1797, and as the map intended to be attached to that writing was not attached, his successor, President Adams, on the suggestion of the Commissioners, on July 23 of the same year confirmed the request and attached both his own and that of his predecessor to this very map.

Besides the intrinsic evidence of its identity, the identity of the map is proved by the opinion of Attorney General Lee in 1799, and by the sworn certificate of Joseph Elgar, Commissioner of Public Buildings, given in 1854. It was to this map and the approval of Presidents Washington and

Adams that Attorney General Charles Lee referred in his opinion on January 7, 1799, and it is important to note that he was the same Attorney General who had examined and approved the instrument signed by President Washington, and that he was still Attorney General in 1798, when President Adams added his approval.

In his opinion (Rec., Vol. VI, p. 293), Attorney General Lee says:

> "Already a plan of the city has been approved and ratified by the President of the United States, who has either signed the plan itself or an instrument referring to the plan, which I presume is a sufficient authentication. If this plan, under the Presidential signature, varies from L'Enfant's or Ellicott's essays, they must each yield to it, as they are to be considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President."

At that time there were but three plans of the City of Washington in existence, L'Enfant's, Ellicott's, and Dermott's.

It is thus clear that it was not the Ellicott or engraved plan which was approved and ratified, but one which varied from both Ellicott's and L'Enfant's.

This contemporary evidence of Attorney General Lee, Attorney General when Washington signed his approval, and also Attorney General when Adams signed his, can not be affected by the subsequent opinions of Attorney General Breckinridge (Vol. VII, p. 2273), and of Attorney General Wirt (Vol. VI, pp. 343 to 350).

The opinion of Attorney General Breckinridge makes no mention of the Dermott map, and it is obvious he did not have the papers before him in order to judge which was the map.

Attorney General Wirt, in his first opinion (Vol. VI, p. 345–6), uses this expression: "In looking at the plan of the city, *or at the diagram accompanying the Commissioner's state-*

ment." And at the end of his opinion (Ib. p. 347) the following:

> "It appears, *by the report of the surveyor* (Mr. KING), that the plans of the city exhibited at the time of the sales of those lots all presented a Water street as the boundary of the building lots."

As will be shown hereafter, *this Mr. King is the person who made* THREE UNSUCCESSFUL ATTEMPTS, BETWEEN 1798 AND 1803, TO HAVE THE DERMOTT MAP ABROGATED.

In his second opinion (May 29, 1820) Attorney General Wirt, after holding, upon the information given him that the Government is obliged to reserve part of the Mall for a *theatre*, says (Vol. VI, p. 349):

> "You will observe that *the correctness of this reasoning depends on the correctness of the supposition that the plan of the city, which has been exhibited to me* by the Mayor, who handed me your communication, IS A TRUE COPY OF THE ORIGINAL PLAN, so far as the site for a theatre is concerned, *as it is certified by Dr. Thornton to be.*"

This is the same Dr. Thornton who, on August 16, 1798, after both Washington and Adams had approved the Dermott map, said to Mr. King that he—

> "*had long been of opinion there was no such thing as a plan of the city, altho' it was absolutely necessary*" (Vol. VII, p. 2254).

In his third opinion (December 16, 1820) Attorney General Wirt says (Vol. VI, p. 349–50):

> "Mr. Breckinridge came to the conclusion that the engraved and published plan of Mr. Ellicott is the only legitimate and authentic plan of the city. . . . *I am not in possession of these acts and communications of President Washington and have therefore, no opportunity of passing an opinion on the accuracy of Mr. Breckinridge's conclusion.*"

Neither Attorney General Breckinridge nor Attorney General Wirt mentions Attorney General Lee's opinion, and, as shown by themselves, neither had examined the facts or was in possession of the information necessary to a correct decision.

But there is a ready and conclusive test by which this confusion can be cleared up even at this day. President Washington's approval contained a specification by metes and bounds of the reservations.

A comparison of the detailed specifications by metes and bounds of the seventeen reservations in President Washington's approval of March 2, 1797, will show that they will not coincide with the reservations indicated upon either the L'Enfant or Ellicott plan, *but accurately and exactly coincide with the reservations as indicated in the Dermott plan.*

It is thus demonstrated that the Dermot plan, approved by George Washington, President for the time being, on the 2d of March, 1797, and which approval, out of abundant caution, was confirmed by John Adams, President for the time being, on July 23, 1798, was the only map of the City of Washington which ultimately received the formal and solemn approbation of the President, and by this map, and this alone, are fixed the rights of the Government of the United States in the City of Washington, whether as to public reservations or streets.

No "Water Street" or Other Street is Laid Out and Delineated on the Dermott Map Along the Potomac River in Notley Young's Land.

It being thus demonstrated that the Dermot map is the only map approved by the President, and there being no evidence in the record of any approval by the President of any streets except as "laid out and delineated in" the Dermot map, it becomes important to ascertain whether a "Water street" was "laid out and delineated in" that plan on Notley Young's land along the shores of the Potomac

River. If such a street was so "laid out and delineated in" that plan, it is at once conceded by appellants that the President's approval of that plan and direction to convey the streets as "laid out and delineated" was a valid creation of such streets in law binding upon Notley Young and all the world.

(a) Inspection of the Dermott Map Shows No Such Street to be Laid Out or Delineated.

It is respectfully submitted that no such street is "laid out and delineated in" said map.

The first and most obvious means of ascertaining the truth in regard to this matter is by inspection of the map. An examination of the map will show the following important matters:

1. That on the shore of the Eastern branch beginning at the east side of Thirteenth street east at the intersection of N street south, and running thence northeasterly along the shore of the branch a street is clearly *laid out and delineated* and is plainly lettered "WATER STREET," just as the other streets are designated by name, number or letter. From Thirteenth street westerly to the Arsenal grounds there is no street of any kind laid out or delineated or in any manner indicated along the shore of the branch, but the squares are laid off—some near the water, some partially and some wholly submerged, some bounded on all sides by direct lines and some having but three lines, and one, at the mouth of the branch, having but two lines and forming an unlimited angle.

This street is therefore abruptly and absolutely terminated at Thirteenth street east *for its* WESTERN *terminus.*

2. That from the north end of the Arsenal grounds, beginning at the south line of square south of south of 506 (marked s.s. 506 on the map), being the south line of T street south and running northwesterly to the foot of Fifteenth street west, the corner of Square 233 (the northernmost point

on the Potomac of Notley Young's land,) the shore of the Potomac is indicated just as that of the branch is *west of Thirteenth street east*, and the squares are laid off, on, near or partially under the water. No street is laid out, delineated, or otherwise indicated. No words, figures or symbols of any kind are employed which tend to lay out or delineate a street, and no line or parallel to any of the squares which would serve to indicate a street is drawn along any portion of this shore of the river. The mere fact that the squares themselves, whether in or out of the water, are bounded by a line, has not the slightest tendency to indicate a street. Nor does the fact that the map in places where squares are not submerged, shows some land between the squares and the river serve in the slightest degree to indicate a street. It was in the contemplation of the parties, when the trust deed was drawn, that the plan of the city which was to be adopted might not use up all the land conveyed, and it was expressly provided in the trust deed that—

> "any part of the said bargained and sold land, if any, *which shall not have been laid out in the said city* be conveyed by the said Thomas Beall and John Mackall Gantt," etc., "to him the said Notley Young, his heirs and assigns" (Vol. V., p. 48).

3. All other places where streets are intended and claimed to exist are clearly "laid out and delineated in" the map, and their designations distinctly made.

Thus in the cases of the named streets, to wit, North, South and East Capitol and Canal streets, and the avenues named for the different States, and the one "Water street" before mentioned, on the Eastern branch, their respective names are set out in full in clear, boldface lettering. And in the cases of the lettered and numbered streets, by their respective letters or figures.

An important and noticeable feature of this part of the work of the draughtsman is that in almost every instance where the street or avenue is long or its course

broken or deflected as by the interposition of a reserva, tion or the like, the number or letter is duplicated and the name is duplicated or so spread as to identify the street throughout its length on both sides of the break or deflection. It is inconceivable that a draughtsman of the painstaking skill which was evidently possessed by the draughtsman of this map would have omitted to designate, in some way, if it was so intended, as a street, one of the most important situations on the map, and one which, without some such specific designation, presents absolutely not the slightest suggestion of being a street.

We confidently submit that the trustees, Beall and Gantt, with the letter of General Washington, himself a surveyor, before them, instructing them to convey to the Commissioners "the streets as laid out and delineated in" this map, and with no other authority than the map and the trust deed could not have found any justification for conveying to the Commissioners a "Water street" along the Potomac out of Notley Young's land, but would undoubtedly have been bound, under the terms of their trust, to reconvey to Young as land "which shall not have been laid out in the said city" any land between the unsubmerged squares and the river.

It is respectfully submitted that so far as the Dermot map is concerned, Water street is not "laid out and delineated" thereon in Notley Young's land, and no title to such an area on the Potomac could pass to the United States by virtue of that map, and the approval thereof and directions to convey according thereto given by Presidents Washington and Adams.

(b) Evidence by Inspection of Dermott Map Confirmed by Contemporaneous Extrinsic Evidence.

It being a matter of demonstration that the Dermot map indicates on its face no Water street or other street between the squares and the river along the Potomac in Notley Young's

land, reference to extrinsic contemporaneous evidence confirms the intrinsic indications on the face of the map found by inspection.

On the 16th of August, 1798, less than a month after President Adams had reaffirmed the approval by President Washington of the Dermott map, Mr. Nicholas King, the surveyor called upon the Commissioners in the interest of Robert Peter, one of the original proprietors, and learned for the first time of the approval by the President of a map of the city. A memorandum of that conversation was put in evidence by the complainant in which the following, among other statements are made:

Vol. VII, p. 2253.

> ". . . . On looking at the engraved plan for the square Mr. White observed that he supposed the streets must be determined by the bounds of the city."
>
> N. King: "Desired to know what were to be considered as the bounds."
>
> Mr. White: "*Them declared by the President of the United States.*"

. . . . . .

P. 2254:

> Mr. W.: "Was not of opinion that the commissioners were empowered to lay out the city. It was the President. When a square was brought to them to divide with the proprietor it was their duty to enter on that division and no farther."
>
> K.: "Wished to be informed what was the plan of the city and who had laid it out."
>
> Mr. W.: "I do not sit here to be interrogated."
>
> Dr. Thornton: "Had long been of opinion there was no such thing as a plan of the city altho' it was absolutely necessary."
>
> K.: "*Had always understood the engraved plan to be that plan, and wished to know if it had not been considered as such by the late President.*"

Mr. W.: "*No, it is not the plan, nor was it considered as such by the late President. That the plan was that sanctioned by the signature of the President of the United States.*"

King: "*Had not seen such a plan, but as the commissioners said there was one so sanctioned he wished to know if it was to be considered as permanent. . . .*"

P. 2255.

K.: "Saw no other way of having the rights of individuals ascertained than by memorial to the President and he, therefore, as it was his duty, would prepare one on the subject, for until it was determined the property in the city lost half its value and the health of the future inhabitants was wantonly sacrificed."

Thereupon the proposed Memorial was made to President Adams on the 10th of November, 1798 (Vol. VI, p. 291), in which one of the specific complaints is that in the Dermot map Water street is OMITTED. The Memorial contains the following statements:

"They alluded [*inter alia*] to L'Enfant's plan, which was somewhat altered by Ellicott, whose plan was engraved and generally considered as the final plan of the city. Since that plan many changes have been made by the surveyors. . . .

"We can not avoid mentioning that *the plan lately transmitted to Your Excellency by the Commissioners as a plan of the city of Washington and to which your assent has been obtained, is extremely variant from the engraved one*; it is incomplete; it is different from that laid off on the ground and acted upon by the Commissioners and the proprietors on the division of lots and squares thereon exhibited."

After enumerating several other variations and objections, it proceeds as follows (Vol. VI, p. 292):

"It is incomplete inasmuch as the rights and privileges of wharfing and water lots are not ascer-

tained; *that street which in every former plan circumscribed the city beyond any building lots and near the channel*, and which was intended to promote the intercourse with merchants, and the free conveyance of merchandize along the wharves, open a free passage for air from the water into the different streets and avenues terminating therein, IS OMITTED, *and in many places a distance of several hundred feet is left to be filled up and occupied by buildings and wharves at the option of individuals.*"

It will be seen from the statements that Mr. King, after having been informed of the approval of the Dermot map, and after examining the same, fulfils his promise and drafts this memorial to the President, the chief complaint of which is that the—

> "*street which in every former plan circumscribed the city beyond any building lots and near the channel*" "*is omitted.*"

Thus showing that Mr. Dermot's plan to the eye of a contemporary surveyor, gave the same indication as to the river shore that it does to-day—namely, the absence of a street between the squares and the river, and the existence of land subject to private occupation.

This memorial was sent to Attorney General Lee, and on January 7, 1799, he rendered an opinion there on. (Vol. VI, pp. 292–294.)

After referring to the memorial as that of Robert Peter and others of November 10, he says:

> "The principal subjects to which it relates are, 1st, the parcels of land selected by the late President for the use of the United States; and 2dly, *the rights appurtenant to the water lots on the Potomac River*, Rock Creek and the Eastern Branch. It has in view for its chief object to persuade the President of the 'necessity of immediately having an accurate and complete plan of the City properly authenticated and established, and from which there can be no departure.'"

He then proceeds:

> "Already a plan of the City has been approved and ratified by the President of the United States, who has either signed the plan itself or an instrument referring to the plan, which I presume is a sufficient authentication.
>
> "If this plan under the President's signature varies from L'Enfant's or Ellicott's essays, they must each yield to it as they are to be considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President. It is not supposed that this is incomplete in any respect except in relation to the rights appurtenant to the water lots *and to the street that* IS TO BE *next to the water courses.* As to the *terra firma* lots (if I may so call them), should any error be discovered on actual survey relative to them, such error may be corrected according to the present plan, and, therefore, on this account to make an entire new plan seems unnecessary and, moreover, highly improper. *As to the water lots, their extent and length is upwards of eight miles, and to define universally the rights, manner and distance of wharfage appurteuant to each lot would be a work of difficulty and expense.*"
>
> (Page 294.) "But there may be particular cases where it WILL BE EXPEDIENT TO DELINEATE WATER STREET and to grant licenses to wharf; to define and settle the rights of wharfing belonging to lots likely to interfere and clash with each other, and in such instances the proprietors should be gratified in their reasonable requests. *The laying off of Water street when done* in part or in whole *will stand in need of the sanction of the President.* So too the like sanction will be necessary to the streets to be laid off on the ground redeemed from the water if houses shall ever be permitted to be built thereupon. . . . *I do not think that the project suggested in the memorial is entitled to the approbation of the President,* and I have endeavored to point out what appears to me most expedient relative to the matters of complaint."

Shortly after this opinion of the Attorney General upon the foregoing memorial setting forth the criticism of the

Dermott map, on February 28, 1799, James R. Dermot, who prepared the Dermot map, answers certain questions propounded to him by the Commissioners as to the map prepared by him. Among them is the following question and the answer thereto (Vol. VI, p. 212):

> "Q. 2d. What are the essential alterations or changes made before your plan was made and *wherein does your plan differ from Ellicott's? Enumerate the difference and, as far as you know, their causes.*
>
> "A. I understand by Ellicott's plan—the printed one—all the alterations and changes (except a few blank squares) were made by the Ellicott's, Freeman, Ralston and N. King before my plan was made. *My plan was made* FOR THE PURPOSE OF CONNECTING THE CHANNELS OF THE POTOMAC AND EASTERN BRANCH WITH THE SQUARES IN THE CITY. *It was made from official documents returned from the surveyors in the field, agreeably to regulations made by the Commissioners at April meeting 1793.*"

And after enumerating various changes he mentions the following (p. 213):

> "*In running* A WATER STREET *on the southeast of Carrollsburgh, on the bank, and establishing the right of wharfing to be governed by the parallel, or east and west streets to the channel.*"

It would be most unreasonable to suppose that Mr. Dermot did not know of the memorial of Peter and others to the President, charging that he had eliminated the water street shown on the engraved plan. In explaining the changes he made, he does not deny that the street that "circumscribed the city beyond the building lots and near the channel" "is omitted," but on the contrary, says that his plan was made "FOR THE PURPOSE OF CONNECTING THE CHANNELS OF THE POTOMAC AND EASTERN BRANCH WITH THE SQUARES." It was therefore by design and not by accident that the street was omitted, and as the map was also

made from official documents returned from surveyors in the field, under the direction of the Commissioners, it was made in good faith, in the public service and not for any private end.

He also says that one of the changes he made was "in running A *water-street*" not on the Potomac through Notley Young's land, but "*on the southeast of Carrolsburgh,*" exactly where it now appears on that map so clearly "laid out and delineated."

Thus, when we leave the map itself and seek extrinsic evidence to determine what it shows, we find the contemporaneous testimony of Nicholas King, a surveyor, interested in having Water street delineated and established; of Attorney General Lee, whose duty it was to know the facts and advise the President thereon, and of James R. Dermot, the very man who made the map and was called upon to explain in detail the variations from the Ellicott plan, all concurring in the view that no street is "laid out and delineated in" the Dermot map along the shores of the Potomac in Notley Young's land.

With the intrinsic evidence furnished by the map itself, and the contemporaneous external evidence concurring, surely, after the lapse of one hundred and one years, nothing short of the most controlling and conclusive evidence could be permitted to establish a contrary contention.

It may, therefore, properly be said to be a matter not of deduction, but of demonstration by the record in this case that there is not "laid out and delineated in" the map of James R. Dermot, any street between the squares and the Potomac River in Notley Young's land.

The Dermott Map a Plan of the Entire City and not Confined to the Appropriations as Claimed by Some.

Some suggestions will be found in the record (not emanating from the President or any one speaking for him) to the effect that the Dermot map was especially prepared to

show the "*appropriations*" and not the general plan of the city.

In reply to this suggestion it will be found, upon examination, first, that there is no evidence showing such to be the fact or in any respect justifying such a characterization of the map, and, secondly, that the President, who alone could approve in whole or in part, any arrangement of streets, made no such qualification of his approval. On the contrary, his approval is absolutely unqualified and in express and distinct terms as to the *streets*. The first sentence is—

> "You are hereby requested to convey ALL THE STREETS IN THE CITY OF WASHINGTON as they are *laid out and delineated in the plan of said city hereto annexed.*"

Language could not be more clear or more comprehensive, and in form and order of statement it is the first in importance—the reference to the appropriations being introduced by the minor phrase, "*and also* the several squares, parcels and lots of ground following, to wit;" etc., concluding, after their several descriptions, with the words, "as the same are *also* laid out and delineated on the said plan."

It is the merest abuse of language to say that a request to convey "all the streets in the city" according to an annexed map is not an approval of the map as to such streets, but only as to the appropriations. Furthermore, as "appropriations" could only be identified by their boundaries by "streets," and are in fact so described by President Washington, an approval of "streets" was a prerequisite to the existence and description of "appropriations."

In addition to this, the most important feature of the memorial of Peter and others, above referred to, was as to a "street," and the petition of the memorialists for the approval of a new map was denied.

Tested by Record Evidence there is no Title in the United States to a street in Young's land along the Potomac.

It is thus clear that there is no escape from the proposition that the title of the United States to "streets" in this city depends solely upon the Dermot map save as to such as have been since acquired by dedication or condemnation.

The foregoing review of the title to the land and water in controversy is limited to matters of public record such as the charters, patents, deeds of conveyances, public statutes, proclamations of the President, and his formal approval of the map finally fixing the limits and boundaries of title in the city for the United States or the proprietors.

This last act of the President approving the Dermott map, will, on inspection, be found to be not an informal act, but a solemn, formal exercise of authority under the trust deed; an authority given not to him personally, but to his office, and which he exercises in that capacity.

Thus, it issues in the name of the "President of the United States of America," is signed by him as such, and the seal of the United States is thereto attached, and the formal execution attested by Timothy Pickering, Secretary of State. The subsequent and confirmatory approval by President Adams is executed and attested in the same formal and official way, and the evidence of these facts are the original instruments produced by their lawful custodian from the archives of the United States, in which they have been deposited by proper authority.

All this documentary evidence is regular and complete in itself, and has required no resort to parol or other extrinsic evidence than such as is necessary in all cases to establish the authenticity and genuineness of the various documents, and, indeed, no doubt is cast upon them, nor any question as to their authenticity raised by the complainant in the cause. The result of this documentary evidence, then, may be properly stated thus:

I.

That prior to the existence of the United States as a Sovereign State, the title to the land on the shores of the Potomac from the Long Bridge to the Arsenal Grounds was in Notley Young in fee simple, and continued in him down to the time of the trust deed June 28, 1791, when it became vested in the trustees, Beall and Gantt.

II.

That title carried with it riparian rights and privileges including the right to build wharves or piers out to the channel of the river.

Steamboat Cases, 109 U. S. 686.
Shively *vs.* Bowlby, 152 U. S. 23–24.

III.

That no title passed out of the trustees except to such land as was laid off for the Federal City.

IV.

That the only land for appropriations or streets the title to which was conferred on the United States was such as was approved for that purpose by the President of the United States.

V.

That the only land so approved by the President was such as was "laid out and delineated in" the Dermott map.

VI.

That no street or appropriation was "laid out and delineated in" the Dermott map in Notley Young's land along the shores of the Potomac River above the Arsenal Grounds.

VII.

That all the land and water lying between the squares in Notley Young's land and the Potomac River was land not "laid out in the said city," and by the terms of the deed of trust was required to be reconveyed by the trustees to said Notley Young, in fee, who, under the terms of the trust deed retained possession of all the bargained and sold lands until required for the satisfaction of the trusts, and that that possession and that title have passed by mesne conveyances to these appellants who still occupy the same.

VIII.

If, therefore, this cause is to be decided upon the record evidence of title, we submit that it is matter of demonstration that the complainant, the United States, has no title to the land and water in controversy and the appellants are entitled to a decree in their favor.

The Attempt to Show Title by Matters in Pais.

This alternative is presented. If the Dermott map approved by two Presidents in solemn form, under the advice, presumably, of the same Attorney General, was an exercise of the power conferred on the President by the trust deeds, that power was thereby exhausted, and the rights of all parties under the trust deeds were thereby fixed.

This is a perfectly easy, simple and conclusive solution of the whole matter and the possessions of all interested and the laws of the land have governed everything since.

Counsel for complainant has, however, in rebuttal sought to show by various matters *in pais*, that by reason of various plats, plans, doings of parties and Commissioners, and acts of the municipal authorities of the city of Washington, the United States acquired some right or title to a water street over the land in controversy and seeks to disturb possessions and titles nearly a century old by evidence as to facts and

circumstances occurring more than ninety years before the filing of said bill, and this not in support of any sovereign right in the complainant existing at the time in the property in the controversy, but to establish some contractual rights or claim alleged to have resulted from such ancient and long forgotten transactions.

Before entering upon this field of inquiry, it is proper to consider what are the relative rights and attitudes of the parties litigant.

As has been already shown, the United States, complainant here, derived no right or title from the special act of Congress, under which this suit is brought. That act gave the complainant no rights it did not already possess, and did not take from these appellants any of their rights or proper defenses, but merely authorized the bringing of the suit and empowered the court to entertain it in a form and under a procedure by which multifarious and disconnected claims might be united in the one suit.

By the rulings of the court below, as already shown, and which are assigned for error in the first and second assignments of error, although the United States was complainant and as such accorded the right to begin and close evidence, and although neither in the bill nor in its evidence-in-chief was any title or ground of claim disclosed, yet in rebuttal of these appellants' evidence it has had recourse to the class of evidence about to be considered.

It is respectfully submitted that by all rules of fairness and equality between litigants, this course ought not to be permitted.

Should this court, however, feel justified in entering upon the inquiry, we confidently submit that such facts as can be ascertained do not tend to show any title in the United States to a Water street in Notley Young's land, but that at the most, they only indicate a project for such a street, as a matter of municipal improvement, not to interfere with or affect private rights of wharfing but exactly consistent with

what has subsisted on the river front ever since the foundation of the city, a project for which it was frequently attempted to secure the approval of the President, but without success.

The Plats of Squares Signed by Young Ineffectual to Pass Title to a Street.

In the attempt to set up some color of title to the United States by transactions at the time of the founding of the city other than those prescribed in the trust deed as a means of vesting title in the United States, importance has been given to the plats prepared in December, 1793, nearly four years before the Dermott map was prepared and submitted to the President, which plats were signed by the Commissioners and Notley Young in March, 1797, after the approval of the Dermott map. On these plats one boundary of the Square is given as Water street.

We respectfully submit that that transaction rightly considered can not have the effect of vesting title in fee to the land in the United States.

As already shown, the trust deed vested the title to the land in Beall and Gantt and the authority to divide it into streets in the President, and the combined action of the trustees, the Commissioners and proprietor could not take from the President his exclusive authority to fix the streets of the city. They could not run streets where he disapproved, nor refuse to run them as he approved, so that for the purposes of the execution of the trust deed such acts of the Commismissioners and proprietors are nullities.

Furthermore, these plans of squares were made while the "essays" of L'Enfant and Ellicott were serving the purpose of "preparatory" plans to the final completed one approved by the two Presidents. The effect of that approval was not only to supersede these "preparatory" "essays," but to cut off any changes by the parties afterward. The preparation of plats conforming with the Ellicott design did not and could have the effect of supplying the want of the President's ap-

proval, which had never been accorded to the Ellicott plan itself or of preventing his approval of the Dermott plan, nor could the signing of these plats by Young and the Commissioners after his approval either revoke or otherwise affect his approval already given to the Dermott plan.

More especially is this so in view of the fact that the petition in the Memorial of Peter and others of November 10, 1798, to President Adams to revoke his approval of the Dermott map, because it omitted Water street, was denied.

It was probably within the competence of Young, without the consent or aid of the Commissioners, to *donate* a portion of any of his land "not laid off in the city" for the purpose of a street, and if accepted and acted upon such would become a dedication to public use as a street. But *such a donation would not be an execution of the trusts in the deed* and could not possibly have the effect of passing the fee simple under the trust deed to Beall and Gantt with any of the consequences which would follow such devolution of title under the rulings of this court in the Van Ness Case, 4 Pet., or the Steamboat Cases, 109 U. S., both of which are based on *the effect of the trust deed*, and not upon any independent act of an owner.

On the contrary the fee would remain in Young subject only to the use in the public of the street as a street and no other right would pass.

There is nothing in the decision of this court in the Steamboat Cases which holds that the riparian privileges which Notley Young had would be in any respect affected by any act of his, such as signing plats or the like, or other act operating as a dedication of the land to the uses of a street, which did not have the effect of passing the fee therein. On the contrary, that question is expressly reserved by the court in the following language:

> "*What effect upon the riparian rights of Notley Young would have resulted from the creation of a perpetual easement for a public way over Water street by a*

grant to the United States to that use alone, the title and right of possession in the soil for all other purposes remaining in the original proprietor, it is unnecessary to discuss. The decisive circumstance in the present case is, that the United States became the riparian proprietor, and succeeded to all the riparian rights of Notley Young BY BECOMING THE OWNER IN FEE SIMPLE ABSOLUTE *of the strip of land that adjoined the river,* and intervened between it and what remained to the original proprietor, Notley Young, after that conveyance."

It is not material to consider here what effect by way of estoppel the signing of these plats by Notley Young might have had in the event of his attempting to prevent the opening of any street indicated thereon. Private persons, purchasing with a knowledge of the existence of such plats, might have set up some claim; but none such has ever been made, and it is immaterial here to consider what would have been the result in such a case. Unquestionably the signing of such a plat by himself and the Commissioners could not override the action of the President of the United States previously taken. The President was familiar with both the Ellicott and Dermott plans; he had dealt with both, and when the time for a final approval came he approved the Dermott Map. Had the Dermott Map run a Water Street along the squares in Notley Young's land and had the plat signed by Young been all bounded by the Potomac River, as in the original returns of the surveyors they were, the Dermott Map with the approval of the President must have prevailed, the plats signed by Young to the contrary notwithstanding.

But whether they could bind Notley Young or not, the signing of a plat indicating streets could under no circumstances pass an estate in fee to the United States or anyone else. There was but one way in which an estate in fee could pass to the United States in any of this land and that was by an act of the President in pursuance of the terms of the trust deed.

In the case of Barney *vs.* Keokuk, 94 U. S. 324, the dedication of the street was held to be one at common law, but the decision in that case can have no application here because, as shown by Mr. Justice Bradley, under the settled law of Iowa the land owner on the navigable water owned only to high-water mark, and that "*the shore between high and low-water mark as well as the bed of the river belongs to the State*" (p. 336), so that the private owner was not in the position of the proprietor in this case as ruled by this court when it says, "*undoubtedly* Notley Young, prior to the founding of the city and the conveyance of his land for that purpose, *was entitled to enjoy his riparian rights for his private uses and to the exclusion of all the world besides.*" (109 U. S. 686.) The legal and historic difference between the public riparian rights in the Colonies, forming the older States (*e. g.* Maryland) and in the Territories, forming the newer States (*e. g.* Iowa), is clearly shown by this Court in the learned and exhaustive examination of the subject by Mr. Justice Gray, speaking for the Court in Shively *vs.* Bowlby, 152 U. S.

In addition to this, a voluntary donation not passing by the terms of the deed, could only be accepted on the terms of the donor, or dedicator, and it is abundantly shown that the understanding of Young and the Commissioners at that time, was that he retained the riparian privileges, notwithstanding these plats, and whatever view may be taken of his rights under the trust deed, there can be no question of his right to reserve what he pleased in a voluntary donation as distinguished from a compulsory surrender under the trust deed.

Nor could this be in anywise affected by the provisions of the Acts of Assembly of Maryland of 1791, Chap. XLV, or of 1793, Chap. XLVIII.

The fifth section of the first act is limited to appropriations and streets, acquired under the trust deed to Beall

and Gantt, with which deed, and not to voluntary donations, the act deals.

Under that deed alone the Commissioners acted in giving the certificates mentioned in the first section of the act of 1793, which section is confined to certificates which the Commissioners had issued or might issue under the allotment provided in the trust deed to proprietors and purchasers of the divided lots.

The King Portfolio Map of 1803 Unauthorized and Ineffectual to Change Any Rights of Government or Citizen.

Next in order to be considered is the King portfolio map of 1803, indicating a "Water Street" between the squares and the river.

It is not pretended that this map ever received the approval of any President, and it is even of less authority than that of L'Enfant or of Ellicott, both of which were seen and considered by President Washington, and formed the preliminary bases to the Dermott map, which he ultimately and formally approved as the final plan to which they must yield.

It is interesting to note that Mr. King was one of the most earnest and persistent advocates of a Water Street along the entire water boundaries of the city. The record teems with his rhetorical descriptions of the beauty and utility of such a street, and with the most harrowing prophesies of pestilential visitations upon posterity unless his favorite idea is carried into effect.

It has been already shown that he acted as the attorney of Robert Peter, and inspired and prepared the memorial of Peter and others in November, 1798, to President Adams, complaining of the approved Demott map because it omitted Water street. His complaint in that form was unsuccessful, as, under the advice of Attorney General Lee, this petition of the memorialists was denied. That same petition

seems to have been placed later before Congress in 1801–2. (Rec. Vol. VI, p. 295), with no better success. Indeed the committee reported in favor of upholding the President's approval of the Dermott map. (Vol. VI, p. 297.)

On September 25, 1803, Mr. King wrote a long communication to President Jefferson which is printed in full in the Record (Vol. VI., pp. 297–309). This will be found upon examination to be a renewal of the subject urged in the Peter memorial upon President Adams and before Congress, and is devoted chiefly to an appeal to have a new map prepared and to have a water street laid out upon it. Notwithstanding its earnestness and zeal it failed to secure executive action and serves only to emphasize the fact that at that time no water street had been approved by the President, that the approval of the Dermott map remained unrevoked and unshaken and the effort to have a water street laid out was still unsuccessful.

That this street had not, up to that time, been approved by the President and that the title to it could not therefore have passed to the United States under the deed in trust is clearly established by the following quotations from Mr. King's letter:

> "The principle adopted in the engraved plan, *if carried into effect and finally established* in the plan now laid out upon the ground, when aided by proper regulations as to the materials and mode of constructing wharves for vessels to lay at and discharge their cargoes on, seems well calculated to preserve the purity of the air.
>
> "The other streets of the city *will* here terminate in a street or key, open to the water, and admitting a free current of air. It *will* form a general communication between the wharves and warehouses of the different merchants; and, by facilitating intercourse, render a greater service to them than they would derive from a permission to wharf and build at pleasure. *The position of this Water street being determined, it will ascertain* the extent and situation of the

> building squares and streets on the made ground, from the bank of the river, and bring the present as near to the published plan as now can be done. It *will* define the extent and privileges of water lots, and enable the owners to improve without fear of infringing on the rights of others."

Notwithstanding his failure to secure executive approval of his design, Mr. King in his desire to save posterity from the horrors of a pestilence prepared the unauthorized map delineating a water street, and counsel for the complainants have offered the same in evidence in this case.

We submit that it is not competent for a surveyor to overrule the President, the only authority under the trust deed, and by his acts to impose upon the city and the proprietors a street which three Presidents had refused to approve, and thereby produce results under the trust deed which the action of the President alone could effect.

The Acts of the Corporation of Washington.

Another species of evidence to which, we submit, undue importance has been attached, are certain Acts or Resolutions of the Corporation of Washington.

Counsel for complainants will doubtless very promptly admit that no title which the United States had lawfully acquired under the trust deed could be taken from it and revested in the proprietors or those claiming under them by any number of Resolves or Ordinances of the Corporation of Washington, and this would seem to be a sufficient answer to any inference that by them the title of private citizens could be taken from them and vested in the United States.

As said by this court in the Steamboat Cases 109 U. S., p. 698, speaking of the resolutions of the Corporation of Washington:

> "But these resolutions decide nothing as to the *right*, even if the corporate authorities of Washington were competent to do so, *which they were not*. . . .

> "In point of law they *merely regulate* the mode in which the *right* shall be exercised, *whether private or public*, leaving the question as to *title* in each case to be *judicially decided; for that was the extent of the jurisdiction which the Corporation of Washington had over the subject.*"

We do not understand, however, that these proceedings of the Corporation are offered in evidence for any other purpose than to show an assertion by that body of its right, as a municipal body, to maintain Water street, a right which, under certain conditions, it might well have had, even had there never been a trust deed or approved map.

The Existing Water Street.

The question whether Water street exists as a physical thoroughfare, or when it came into being as such, is not the important question in this case, as that might well be without any consequences to riparian rights, but the real question is *how* did it come into existence. Was it by the legitimate execution of the trust deed to Beall and Gantt or by some subsequent agreements, consents or other matters *in pais?*

The importance of this question and its correct answer lies in the difference of consequences which would ensue.

It is quite freely admitted that a well-defined Water street now exists as a physical fact, and for some years has existed, between the lots and squares and the river along the whole river front, from the Arsenal to the property of the appellant Willis, successor in title of A. J. Harvey, between whose land and the river no street now exists, or in fact ever has existed, and as to which some special observations will be made later on.

The right of the municipal authorities of this District to maintain said street so far as it now exists as a public street is likewise fully admitted. What is denied is that the United States has any title whatever to said street, but that

the fee remains in the successors in title of Young, and the *use*, as a *public way* only, is a public right.

In many parts of the city the proprietors of squares have subdivided the land and made streets and alleys, as in the cases of Jefferson Place, in Square 139, between M and N and Connecticut avenue and Nineteenth street; O street, in Square 181, between Sixteenth and Seventeenth, and in Square 195, between Fifteenth and Sixteenth.

None of these streets, or of many similar ones which could be mentioned, were laid out on any plan of the city, and, of course, have not been approved by the President. No fee or other title in these streets ever passed to the United States under the Beall and Gantt deed or otherwise, though there is undoubtedly a right in the lot holders and the municipality to have these streets maintained as such.

Thus it seems clear that the evidence presented by complainant can not have the effect of showing title in the United States or of disturbing the rights of appellants.

A Court of Equity Ought Not to Disturb the status quo After the Lapse of Nearly a Hundred Years.

If, however, the court should consider that the complainant, by abandoning the plain source of title, the legitimate execution of the trust in the trust deed, and by reference to matters *in pais* between proprietors and officials at the time of the founding of the city, has shown some apparent right or title in the United States which is not fully met by these appellants, there is yet, we submit, a controlling reason why any such apparent *prima facie* right can not be permitted to prevail over the contemporaneous and continued acts of possession of Notley Young and those claiming under him, utterly inconsistent with any right in the United States.

The Question is not can the United States Enforce a Right After the Lapse of a Hundred Years, but can a Court of Equity Ascertain it.

In a proceeding brought by private persons in this posture of the complainant, the bill would be dismissed because

of limitations and *laches*. Those defenses are not open to these appellants under the well settled and numerous adjudications of this court, but the lapse of time since the transactions upon which complainant relies does present an aspect in which it is not within the competency of a court of equity to enter upon the inquiry—not because of any statutes of limitations or neglect or delay of the complainant in asserting its rights, which, as before observed, can not be set up against it, but because of the impossibility of accurately ascertaining the facts and doing justice. In the case of United States *vs.* Beebe, 4 McCrary, 12, where it was sought to set aside certain patents to land issued forty-three years before the bill was filed, McCrary, J., after admitting that neither limitations or *laches* could be set up as a bar to a suit by the Government, says (p. 13):

> "Unless, therefore, this defence can be supported upon some principle of equity jurisprudence separate and distinct from any State statute of limitations and from any considerations based alone upon the *laches* of the public agents of the Government it must fail, however disastrous to the right of innocent parties, and however inequitable the consequences may be.
>
> "We are thus brought to the consideration of the question whether a lapse of time so great as to afford a clear presumption that all the witnesses to the transaction in controversy are dead, and all proof lost or destroyed, will of itself constitute a bar to a suit in equity, independently of any statute of limitations and without regard to any question of *laches*; or in other words, should a court of equity refuse to entertain a bill in equity upon the sole ground that the lapse of time has been so great as to make it impossible to ascertain the facts and apply the remedy, by reason of the death of the witnesses and loss or destruction of proofs. In my judgment, the doctrine that a court of equity will not entertain a claim so stale as to be not capable of satisfactory proof must stand as one applicable alike to all suitors; it rests not upon any statute of limitations, nor upon

any doctrine of *laches* alone, although the fact of *laches* may always appear; it rests rather upon the sound rule that no court should ever entertain a controversy after the ravages of time have destroyed all the evidence concerning it. A party called upon to answer to a charge of fraud committed by his ancestors, or those through or under whom he claims, more than forty years before the commencement of the suit, need not plead the technical bar of the statute of limitations or the *laches* of the complainant; it is enough if he alleges that the claim is stale, and insists that by reason of the long delay in bringing suit the witnesses by whom he might have explained the transaction are dead. To compel him to submit his rights to adjudication under such circumstances would be abhorrent to the principles of equity, not because of any statutory bar or any *laches* merely, but because the great lapse of time is evidence against the complainant and in favor of the defendant, and because it is contrary to equity and good conscience that any person should be brought into the court to answer for a fraud alleged to have been committed by others before he was born, and so long ago as to make it impossible for him to find living witnesses who have personal knowledge of the facts. Under such circumstances a court of equity ought to presume that the persons who were cognizant of the facts could, if living, explain them so as to disprove the charge of fraud. . . ."

The case was brought to this court by appeal. (United States *vs.* Beebe, 127 U. S. 338.) This court carefully affirmed the doctrine, so many times announced by it, that the defence of limitations and *laches* could not be set up against the United States; but it found that the United States was only a nominal party, and affirmed the judgment without expressly deciding whether the reasoning of the court below as to the *power of a court of equity* to afford relief after lapse of time had destroyed all evidence, could be applied where the United States was the real party.

In the case of Attorney General *vs.* Fishmonger Co., 5

Mylne & Cr. 16, an information was filed by the Attorney General to impeach the title of the company to certain tenements in London it had enjoyed for four hundred years, and have the company declared a trustee for charitable purposes. The chancellor, Lord Cottenham, in disposing of the case, said:

> "One of the *principal reasons* for admitting the limitation of suits is *the difficulty of ascertaining the facts necessary to make it safe to exercise the judicial power.*"

This court in Hammond *vs.* Hopkins, 143 U. S. 224, in considering the doctrine of *laches*, said (p. 250) that it is—

> "*peculiarly applicable where the difficulty of doing entire justice* arises . . . by reason of the original transactions having become *so obscured by time* as to render the *ascertainment of the exact facts impossible.*"

It is true, as above stated, that this observation of the Chief Justice was made in considering and discussing the question of *laches* between private persons as litigants, but the difficulty he mentions would be equally insurmountable and an equal bar to equitable relief without reference to the character of the parties or the existence of *laches.* Had the complainant in that case been the United States the defense of *laches* could not have been set up, yet that immunity could not have overcome the obscurities and ravages of time, and the court would have been bound to decline to enter upon a judicial investigation of matters inherently incapable of safe judicial determination because of the impossibility of correctly ascertaining the facts of the original transaction.

We respectfully submit therefore that if there were any transactions between Notley Young and the agents of the United States in the last decade of the last century which might have created any right in the United States it is now too late for a court of equity to examine them,

as in the nature of things, the true state of facts is now impossible of correct ascertainment, and the relief sought must be denied, not by reason of any *bar* to the *right* of the United States, but for lack of *power* in the courts to ascertain that right and to do justice between the parties, which lack of power in the court, no immunity or privileges of the sovereign as a suitor can supply.

The question is not can the United States enforce a right once unquestionably belonging to it—notwithstanding lapse of time or negligence of agents.

The question is, can a court of equity ascertain after the lapse of a hundred years whether the United States ever had any right growing out of matters in pais, all relating to contract, and none of them relating to any sovereign power of the Government.

THE DECISION IN THE STEAMBOAT CASES, 109 U. S. 672.

At October Term, 1883, this court had occasion to consider, in the above cases, the question of the right of owners of lots in the Notley Young tract to exercise wharfing and other riparian privileges in the Potomac River, and the majority of the court held adversely to such right.

While substantially the same question of right is presented in this case it arises upon a very materially different Record presenting an entirely different state of facts from that presented by the record in those cases.

Counsel believe that the equities of the private claimants as against the Government, which appealed so strongly to the justices dissenting from the judgment in those cases are much more strongly shown by this Record, so as to justify the court in qualifying very materially, if not in overruling the main principles of the decision in those cases, yet it is not necessary to do so in behalf of these appellants, as the case

presented by this Record will justify a decree in their favor without disturbing or modifying the views of the majority of the court as to questions of law applied to the cases then before it.

In those cases many material facts which formed the basis of the decision of the court were either admitted by the litigants on both sides, or, if not specifically admitted, were not disputed, while in this case the very same facts are vigorously contested by these appellants, and, as a consequence, the very converse of the facts upon which the judgment of this court proceeded in the Steamboat Cases is established by the Record in this case.

The theory upon which the complainants proceeded in the Steamboat Cases was that, notwithstanding the interposition between the squares and the river, of a street, the title in fee of which was in the United States, the riparian privileges which had attached to the entire tract before the establishment of the city were appurtenant to the lots facing the river, although they were separated from the river by the said street.

If the parties were right in this theory, it was immaterial in whom the fee in the alleged street was vested, and the question as to the title to the alleged street was therefore not raised in the case.

The record in this case, however, presents an entirely different state of facts and contentions. These appellants positively deny that the United States has title to the strip of land called Water street, between the squares and the river, and maintain, on the contrary, that the title to the same, under the legitimate execution of the terms of the trust in the deed to Beall and Gantt reverted to Notley Young and is now vested in these appellants as his successors in title.

The differentiation of the two cases can perhaps be best indicated to this court by taking up in detail the various

propositions of fact involved in the opinion in the Steamboat Cases and pointing out wherein they are controverted by the established facts in this Record.

It can not, of course, be contended that the decision in those cases is *res judicata* as they were between different parties and it can only be controlling authority as a precedent so far as the analogy between the two cases can be traced.

It is with the view of showing that the cases are not analagous that counsel will undertake to present an analysis of the propositions of fact involved in the opinion.

I.

The Trustees never conveyed the streets or public appropriations.

On page 677, after referring to the clause in the deed to Beall and Gantt which provided for the substitution of trustees for them on the request of the President, and after reciting the request by the President, on October 3, 1796, "to convey *all* the unconveyed residue of the land granted by Notley Young," the court in its opinion in the same paragraph says—

> "on November 30th, 1796, Beall and Gantt *accordingly* conveyed by deed, in fee simple, to the commissioners last named."

The inevitable inference from the language of the court that the President requested the conveyance of "ALL the unconveyed residue" and that the trustees "ACCORDINGLY conveyed by deed, in fee simple," is that the court understood from the record then before it that the trustees had complied with the request of the President and "*accordingly*" conveyed "*all*" the land.

Upon reference to the record in this cause (Vol. IV, p. 1397–8), it will be found they did nothing of the kind. On

the contrary, the only deed made by the trustees, after reciting the President's request that they "convey *all* the lands now vested in them by the said Notley Young," then proceeds, not in *accordance*, but "*in part compliance* with the request of the President of the United States above recited" to convey "all that *part* of the land" (p. 1397)—

> "*which has been laid off into squares, parcels or lots for buildings*, and now remaining so laid off in the said city of Washington." (p. 1398).

It is quite true that the trustees were, by the terms of the trust deed, bound to execute the conveyance requested by the President on October 3, 1796, and ordinarily, in a court of equity they would be held to have done so for all purposes of legal consequences.

But it is shown by the Record in this case that their failure to execute the deed was not the result of accident or refusal by the trustees, but was due to the fact that the Commissioners acting for the President, deemed the execution of the request at the time and in the manner suggested as unwise, and the President, under the circumstances here disclosed, must be presumed to have acquiesced therein and to have modified his request to conform with the suggestion of the Commissioners, contained in their letter (*infra*) with which the deed they did execute entirely accords.

II.

The Commissioners' reasons for separate conveyances.

The reasons which justified the acceptance of such a "*part* compliance" with the President's request appear in this Record in a letter of Commissioners to President Washington, dated November 30, 1796, the very day the deed was executed, in which they say (Vol. VI, p. 319)—

> "That *part* of the land which is held for the use of the United States we consider as in a very different predicament from *those parts* which are to be reconveyed to the original proprietors, or sold, in

order to raise money for the purpose of erecting the Federal buildings. *The first ought to be conveyed to the Commissioners for the use of the United States by virtue of the 3d Section of the Act of Congress, entitled 'An Act for establishing the temporary and permanent seat of the Government of the United States.'* The others *may be* conveyed to any *person or persons whom the President shall appoint*, and although he has in this instance appointed the Commissioners, yet we conceive *the last description of land must be conveyed to us, in our individual* and not *in our official capacity*, because, not being a corporation, we can not take an estate to hold to us and our successors. *If we are right in this opinion, there ought to be different conveyances for the different descriptions of land.* The public property *to be conveyed*, no doubt, consists of *the streets and squares delineated on the plan*, but we should hesitate to advise a conveyance from the trustees to ourselves, agreeably to the Act of Congress above mentioned, *without a more explicit and particular declaration from the President respecting the lands to be appropriated than has hitherto been made.* We presume the plan of the city will enable you to point out the appropriations with sufficient accuracy for the purpose of making such declaration. *When this is done, we will call on the trustees for a conveyance agreeably thereto*; but as we intimated in our letter of October 1st that this, being a great national object, we did not wish the completion of it to rest solely on our opinions, it would still be agreeable to us to have the direction or approbation of the Executive, who, we presume, will advise with the Attorney General with regard to the mode to be pursued, and that the Attorney may be enabled to form an opinion, we have sent a copy of one of the deeds of trust."

III.

The Trustees' reasons for refusing to convey the streets and appropriations by definite description, as required by the subsequent formal approval of the Dermott map.

That the trustees never did convey the streets and reservations, but only "that *part*" of the land "laid off into

squares, parcels or lots for buildings," is further evidenced by the fact that the foregoing suggestion of the Commissioners' letter was acted on in the special and formal request of President Washington on March 2, 1797, and of President Adams on July 23, 1798, to the same trustees to convey

> "all the streets in the city of Washington, and also the several squares, parcels and lots of ground following."

describing by metes and bounds the seventeen public appropriations (Vol. VI, pp. 152, 156, 157).

This second request of the President was not complied with for the reasons stated in the letter from Beall and Gantt trustees, to Commissioners (Rec., Vol. VII, pp. 2261–2262), dated May 8, 1799, in which they say:

> "We have received your letters requesting us to convey the streets and the public appropriations in the City of Washington to you—the deed which you have prepared for that purpose we have seen. It contains a particular description of the appropriations. You have been apprised of the circumstance that several of the original proprietors have requested us not to execute the deed. And we have objections ourselves to executing it; principally on account of the description of the appropriations.
>
> "We wish to avoid any dispute on this head; and altho' we cannot with propriety, in our opinion, comply with your request, we are willing to execute a deed containing a general clause of all the Streets, squares and parcels of ground, in the City of Washington which have been laid off and deemed proper for the use of the United States by the President pursuant to the Deeds in Trust from Notley Young, Daniel Carroll of Duddington and others to us. Or we are willing to convey to you or any persons which the President shall appoint, all lands in the City of Washington not already conveyed agreeably to the Deeds in Trust, subject to the trusts yet remaining to be executed and to the end that the same may be perfected. We hope a conveyance of this kind will answer your purpose, as well as the one proposed by

you, and we prefer it on this account, that we may get clear of the trust altogether and avoid any trouble and expense in consequence of the existing controversy between the Commissioners and some of the Proprietors about the true location of the City."

IV.

The Commissioners' refusal to accept the proposed indefinite deed.

To this letter the Commissioners promptly replied on the following day, positively declining to accept the conveyance suggested by the trustees; and they used the following language (Rec. Vol. VII, p. 2262):

"We have before us your favor of yesterday, and can not but lament that after so long deliberation you should determine it to be improper to execute any other Deed but the one you propose.

"On a subject of this Magnitude it can scarcely be expected that we should accept of a Deed without any designation of the property by which its metes and bounds could be hereafter known, especially when it is recollected that Mr. John M. Gantt himself suggested the propriety of the President's Instructions, containing the Metes and bounds of the Public appropriations, agreeably to the Deed tendered, being annexed to, and referring to a plat, and said he had no objection to execute the Deed when such Instructions were obtained; but intimated that he was under honorary engagements to Mr. Sam'l Davidson, to communicate to him such his intention previous to the execution of the Deed, that he might apply for an injunction if he thought proper.

"These assurances from Mr. Gantt, made so long since as June, 1798, led to the application to the President; and we can not but express our surprise at finding this gentleman now opposed to the execution of a Deed drawn strictly conformable to the mode pointed out by himself, and no Injunction having yet appeared, though more than seven

> months have elapsed since the President's Instructions were forwarded to you.
>
> "We know of no good consequence which could arise from such a Deed as you propose, than from any other than one plainly and explicitly designating the property meant to be conveyed; nor can we accept of any which does not expressly designate the public appropriations by Metes and bounds, agreeably to the President's Instructions."

Thus it is seen that the court was not correctly advised as to the facts, but was lead to erroneously suppose that *all* of the land, which would include streets and public appropriations, had, in November, 1796, been conveyed to the Commissioners, whereas, in fact, as above shown, it had not been conveyed, but, on the contrary, the conveyance had been refused and was the subject of controversy between the trustees and the Commissioners.

No deed was ever subsequently made by the trustees and the title of the United States depends wholly upon the estoppel raised by the trust deed to Beall and Gantt and the requests of Presidents Washington and Adams of March 2, 1797, and July 23, 1798, respectively, above referred to, with which requests the trustees did not comply.

V.

Mr. Justice Story's similar erroneous impression in the Van Ness Case.

This erroneous supposition of the court had other support than the practical admission of the parties, for Mr. Justice Story, in Van Ness *vs.* The City, etc., 4 Pet. 283, had fallen into the same error as to the provisions of this deed. He had said in that case:

> "Beall and Gantt, the trustees, made a conveyance of *the premises* by an indenture, dated the 30th of November, 1796," . . . and, *among other things,* conveyed to the Commissioners all that part

> of the lands, &c., which had been laid off into squares, parcels or lots for buildings, and now remaining so laid off in the City of Washington."

As already shown, they did not convey "*the* premises," but only "that *part*" "laid off into squares, parcels or lots for buildings," and these not "*among other things*," as erroneously supposed by Mr. Justice Story, because they were the *only* things conveyed.

It is not at all surprising that in the confusion which characterizes the documents in relation to these ancient transactions, a mistake of this kind should occur, but that the court was, in fact, misinformed, upon both occasions, as to the extent and character of the conveyance is made a demonstration by inspection of the Record now before it.

VI.

The importance of the fact that the land for the streets was not conveyed.

The importance of this error of fact into which the court was led in the Van Ness Case (4 Pet.), and the Steamboat Cases (109 U. S.), as to the scope of the deed from Beall and Gantt to the Commissioners of November 30, 1796, lies in the fact that it formed the basis for the deduction, on page 680 of the opinion in the Steamboat Cases, which the court thus states:

> "The transaction between Notley Young and the public authorities, as evidenced by the documents and circumstances thus far set forth, was equivalent in its result to a conveyance by him to the United States in fee simple *of all his land described, with its appurtenances*, and *a conveyance back* by the United States to him of square No. 472, and to Greenleaf of square No. 504, bounded and described as above set forth, *leaving in the United States an estate in fee simple, absolute for all purposes, in the strip of land designated as Water Street*, intervening between the lines of the squares as laid out and the Potomac River."

If the court had been advised of the real facts as disclosed in this Record, which show that the deed of November 30, 1796, by Beall and Gantt only conveyed the building lots, an exactly opposite deduction would have been inevitable, namely: that all that passed by the deed from Beall and Gantt being building lots, while Squares 472 and 504 passed to the Commissioners and from them to Young and Greenleaf respectively, by that deed *nothing* passed to the United States except an *equitable estate in common with the proprietors in the building lots* and there remained *in the trustees* the title to the strip of land designated in the Steamboat Cases as Water street, and to all the other land not converted into lots, parcels or squares for buildings.

It must be remembered that by the terms of the trust deed, the United States was to get absolute title to nothing but the streets and appropriations, and that the residue of that laid off in the city was to be fairly divided.

It must also be remembered that the expressed purpose of the authority given in the deed to Beall and Gantt to make conveyance to "such person or persons" as the President shall appoint, was only an *"eventual provision"* for the substitution of a trustee to avoid the consequences of death or other interruption in the execution of their trusts under the deed.

That clause of the trust deed is as follows (Rec., Vol. 5, p. 49):

> "And because *it may so happen that by the deaths or removals* of the said Thomas Beall and John Mackall Gantt, *and from other causes difficulties may occur in fully perfecting the said trust by executing all the said conveyances,* IF NO EVENTUAL PROVISION IS MADE, it is *therefore* agreed and covenanted between all the said parties, that the said Thomas Beall and John Mackall Gantt, or either of them, or the heirs of either of them, lawfully may, and that they at any time, at the request of the President of the United States, for the time being will convey all or any of the said lands hereby bargained and sold which shall not

> then have been conveyed in execution of the trusts aforesaid to such person or persons as he shall appoint, in fee simple, *subject to the trusts then remaining to be executed, and to the end that the same may be perfected.*"

The grantees in such a conveyance from the said Beall and Gantt were by the express provisions of the deed in trust obliged to hold upon precisely the same trusts as those under which Beall and Gantt held. Thus the great importance of a correct view of the facts, with reference to the conveyance which Beall and Gantt actually did make, becomes apparent, because no title could pass to any one not saddled with the original trusts of the Beall and Gantt deeds, except in the execution of those trusts, whether the legal title remained in them or was vested in substituted trustees.

Had the trustees complied with the first request it could not have vested any title in the United States or created any new rights in them not already existing under the deed to Beall and Gantt, but could have operated only to change the trustees.

The only title the United States could get was to the streets and appropriations approved by the President; which, as before shown, the trustees had failed to convey.

As before shown, both the Commissioners and Presidents Washington and Adams recognized that this situation of affairs should not be permitted to continue, and on the 2nd of March, 1797, and the 23rd of July, 1798, in order to secure what the United States was entitled to, as soon as it had become ascertainable by the approval of a plan fixing the streets and appropriations, requested the trustees, Beall and Gantt, *still holding the legal title,* to convey to the Commissioners all the streets in the City of Washington and all the appropriations as laid out and delineated in the Dermott Map.

It is readily admitted that this request was equivalent in equity to a conveyance by the trustees to the United States

of what was therein requested—but the legal effect and consequences of such a conveyance, so far as this case is concerned, depend wholly on a question never examined by this court in the Steamboat Cases, viz: Whether a water street or—

> "the strip of land designated as Water street, intervening between the lines of the squares as laid out and the Potomac River,"

was, by the request for conveyance sufficiently described or indicated, either in the request itself or in the map annexed, to pass the strip or street.

VII.

As to the Plan of the City.

Misapprehension of the Court, produced by Record in 109 U. S.

The opinion further proceeds as follows (p. 677):

> "In the meantime [*i. e.* prior to the conveyance in November 30, 1796], however, *the plan of the city* had been *adopted* and promulgated, on maps of which were laid out the squares, lots, *public grounds* and *Streets.*"

It has already been shown that the only authority by which "the plan of the city" could be "*adopted*" was that of the President; that President Washington "adopted" the Dermott Map on March 2, 1797, which act President Adams confirmed July 23, 1798, while *prior to and on November 30, 1796, no plan had been adopted*, and this record shows beyond controversy that the "public grounds" were only fixed by the Dermott map, the only map to which President Washington's description of them will apply.

It is quite easy to see how the Court was misled into this error. There was *no issue made* in the case *as to the title* of the United States *to the supposed Water street* and no question raised as to its valid creation under the trust deed.

It was not necessary to consider or decide in that case what was the lawful plan of the city. The bill alleged the street to have been laid out in the plan of the city and the answer admitted it.

VIII.

The plan solemnly approved by the President not before the Court in 109 U. S.

The fact is that the only lawful plan of the City, the Dermott Map, approved by the President was not in the transcript of the record in that case, nor in the briefs of counsel, and the presumption must be that it never got before the Court at all either in the hearing or during consideration by the Court.

By reference to the printed transcript of record in that case (Nos. 133 and 134 of October Term, 1883, pages 73 to 79) it will be found that the Dermott Map was regularly given in evidence and proved by competent testimony as well as the approvals by Washington and Adams, and at the bottom of page 73 is the following:

> "(NOTE.—A copy of said Map is to be produced hereafter). The said copy of said Map is herewith filed and marked 'W. M. No. 1' and the same is admitted to be a true copy."

But at the top of page 74 of said printed transcript is the following entry:

> "EXHIBIT W. M. No. 1.—MAP. (Not found in record.—CLERK SUP. CT., U. S.)"

It would seem that, just as in March, 1797, by an oversight the original map was not attached to General Washington's approval, so in October, 1875, nearly a century later, the examiner omitted to attach the copy to the deposition of the witness, John Smallwood, by whom it was proved.

But, as before observed, the title to the supposed street not

being in issue in the case, the map was unimportant, and it is doubtful if it would have received any special consideration had it been before the court.

Indeed the only apparent purpose for which it was to be used in that case was to show that no fixed width was given to Water street which was admitted in the answer.

IX.

The Ellicott Map erroneously considered as the plan of the city.

A printed copy of an inaccurate tracing of part of the "Ellicott map" of 1792 was given in evidence by the complainant and appears on page 114 of the printed transcript in the case.

There can be little room for doubt that in this state of the record in those cases, there being no issue as to the lawful map of the city and the title of the United States to a Water street, the court assumed that the Ellicott map was the lawful plan of the city, which explains certain statements in the opinion of this court in that case.

Thus on page 678 the opinion proceeds:

> "It has been observed that both squares, No. 472 and No. 504, are bounded on the southwest by Water street. *This street was designated* ON THE ADOPTED PLAN *of the city as occupying the whole line of the river front, and separating the line of the squares from the river for the entire distance from 14th street to the Arsenal grounds.*"

And again, on page 679, the court adopts the statement in the answer of the defendant, that:

> "The Commissioners, on March 22, 1796, made an order *directing it to be laid out eighty feet in width from square 1079 to square east of square 1025*, and to 'run out the squares next to the water and prepare them for division,' and that it was so designated on maps of the city in 1803."

And again on the same page the court says (679):

> "*It is* QUITE CERTAIN *that such a space was designated* ON THE OFFICIAL MAP *of the city as originally adopted.*"

As the court did not in fact have before it the "*adopted plan*" or the "*official map,*" it will not certainly consider itself bound by expressions applied to the record then before it in considering the present case upon a record which does contain the very matter which was then believed to be but was not in fact before the court, especially in view of the fact that the question as to what is the lawful plan of the city is one of the most important issues in this case.

It is confidently submitted that had the Dermott map been before the court with the evidence disclosed by this record, no such expressions of views would have been found in the opinion. Furthermore, had the Dermott map been before the court they would have found that the space from Square 1079 to square east of Square 1025, which the Commissioners in March, 1796, directed to be laid out eighty feet in width, is *the one space on the Dermott map and the only space* where a Water street is "laid out and delineated," thus limiting the street to that particular locality where, at the time of the President's approval, it had been finally decided upon.

X.

There were no water lots in Notley Young's tract except those on the Potomac.

Again, this court in discussing the provisions of the Morris and Greenleaf contract and the term "water lots," says (p. 692):

> "*There were lots in Notley Young's land as laid out which answered the description without reference to those lying on the north side of Water street.*"

Yet, if the court will examine the evidence in *this* record furnished by the undisputed maps it will find that there is not an inch of Notley Young's land laid out in lots in the city that even faced the direction of water, except that lying along the Potomac River from the Arsenal to Fifteenth and D streets. The only other portion of his land which abutted on water was that taken for the Arsenal grounds, which was bounded by both the river and the Eastern Branch. His other boundaries were the lands of Daniel Carroll, David Burnes, the town of Carrollsburgh, and the canal.

XI.

The Ellicott map did not correspond with the surveys and for that reason, among others, was never finally approved or adopted.

Further on, in speaking of the confusion and uncertainty which existed as to "water lots," this court says (p. 692):

> "In part, at least, the uncertainty arose from the fact that *the plan of the city, as exhibited on paper, did not accurately correspond at all points with the lines as surveyed and marked on the land.*"

This is quite true of the Ellicott map, which was the map before the court in those cases. That map having been engraved and published in 1792, and no returns of surveys having been made until after April, 1793 (Vol. VI, 215), was necessarily imperfect in the respect mentioned.

But this observation of the court could not have been made as to the Dermott map approved by President Washington, which map was made after the work of the surveyors was all completed from official documents returned from the surveyors in the field agreeably to regulations made by the Commissioners at April meeting, 1793. (Vol. VI, p. 212.) While the Ellicott map shows the general scheme of the city with an extensive and elaborate system of moles and the

like, the Dermott plan approved by the President exhibits the river lines as they actually existed.

XII.

The United States was not a party in the Steamboat Cases. 109 U. S.

There is one further important distinction between the case presented by the records in the Steamboat Cases and the one now before the court.

In those cases the United States was not a party. If there were any peculiar equities as between the United States and the complainants, which, in a proper proceeding, would have justified a decree in behalf of the complainants, they could not be adjudicated upon that record.

In the present case the United States is a party submitting to the jurisdiction of the court, in a case in which, by the express terms of the statute of the court, has more than the ordinary powers of a court of equity to do justice according to the peculiar facts and circumstances of the case.

By the third section of the act under which this anomalous suit is prosecuted the court is given "*full power and jurisdiction*" to "*confirm* ANY CLAIM OF ANY CHARACTER arising or set forth in the premises," so that, relieved of all embarrassments arising out of purely technical rules and distinctions, the court, in this case, is empowered to do justice between the parties according to the very right of the matter.

We respectfully submit, therefore, that this court may and should proceed with the examination and determination of this controversy as though the decision of the case between the steamboat companies reported in 109 U. S. 672 had never in fact been rendered.

THE EQUITIES OF THE CASE.

The Enlarged Power to deal with Equities Given by the Special Act.

When the question here involved was before this court in the Steamboat Cases (109 U. S. 672), there was presented a controversy between rival private corporations engaged in the carrying trade along the Potomac river.

The complainants in that case sought to enjoin the defendant from certain acts upon the river front as detrimental to their rights as owners of contiguous wharves. The requisite parties were not before the court to enable it to pass upon equities between the United States and the complainants, and the complainants could, therefore, only prevail by showing title to what they claimed as a legal right, and the enjoyment of which they sought to have protected by the extraordinary remedy of injunction.

As the bills, in effect, admitted that the title to land along the river shore had passed in fee, as a street, to the United States, the complainants were, in the view of the majority of this court, cut off from any riparian privileges as matter of law, and being without a legal estate in the premises the relief sought was inevitably denied.

In the present case the proceeding is a direct suit by the United States under a special act of Congress which gives the court express power to "confirm *any claim of any character* arising or set forth in the premises."

This court has, therefore, the fullest liberty and power to inquire into the equities of the case and, without reference to merely technical rules of legal estates, to adjudge the matter in accordance with equity and good conscience.

If this court shall, upon the issues and evidence presented in this record, find, that no title passed to the United States to the land along the shores of the Potomac in Notley Young's land, then all pretext of rightful claim in the

United States is at an end and the claims of appellants must be upheld as matter of legal right.

If, however, the court should reach a contrary conclusion, and be persuaded that the record here establishes that title in fee to the land on the river shore did pass to the United States, then, having the United States before it, by express statute submitting to the enlarged and complete jurisdiction above mentioned, it must consider the equities between the United States on the one hand and the private claimants on the other, and we respectfully submit, that a just appreciation of these will, of necessity, lead to a decree in favor of these appellants.

Appellants' Claims Founded in Absolute Good Faith a Hundred Years Ago.

This suit was instituted in 1886, more than ninety years after the the transactions out of which the equities arise took place. In the nature of things, death had long since claimed all who could by their testimony shed light upon those transactions.

The complainant was, is and always has been, out of possession of the property in controversy, which has been occupied during all that time by these appellants and those under whom they claim.

This occupation did not arise through secret, tortious and fraudulent entry upon the property of the United States, but openly, peaceably, under claim of right acquiesced in by the agents of the Government, and under views of legal rights, whether erroneous or correct, undeniably honest.

By express legislative enactment of Maryland, continued in force by express enactment of Congress, *the right of wharfing as a private right in the City of Washington was distinctly recognized*, and the regulation and *licensing* thereof committed to the very officials charged with superintending the fair and equal division of the property between Government and proprietor.

Large sales were made, and vast sums realized by the Government (notably in the contract with Morris and Greenleaf) of lands in Notley Young's tract as "water lots," under the express stipulation of the right of wharfing as a private right, then and now claimed and always exercised to the present time.

On the faith of these proceedings, as shown by abstracts of title in this Record, innumerable sales and mortgages of this very property have been since made representing countless thousands of dollars, and most extensive and expensive improvements have been placed on the property from purely private means, and without the expenditure of one dollar by the Government.

Some faint idea of these improvements, their character and extent, can be obtained by examining the photographs in Volume VI of the Record, immediately following the plats after page 398.

These improvements consist of large and costly buildings, and wharves, placed there at great expense as shown in the testimony, by the private parties claiming the right to the land and water on and in which they are erected and of a character incapable of being moved and utterly useless except for the purpose and in the places designated.

In the bill of complainant, there is contained the following passage:

> "The complainant disclaims *in this suit* seeking to establish its title *to any of the wharves* included in the area described in paragraph 3 of this bill, and *claims title only to the land and water upon and in which said wharves are built*, leaving the question of the ownership of the wharves proper, where that is a matter of dispute, *to be decided in any other appropriate proceeding.* (Vol. I, p. 12.)

The purpose of this gracious, but only temporary, disclaimer, as to these immovable structures, is not apparent,

unless it be designed in a measure to soften the obvious and intolerable hardship to which the present proceeding seeks, at this late day, to subject these appellants. They have, in good faith, and under the eyes of the complainant and its agents, during ninety years before the filing of this suit, developed, improved, built up—in fact created, by their money and labor, without aid from the Government, the only commercial water facilities of the city. They have done this upon property honestly acquired, by purchase, for full value, that value in many instances being paid to the Government upon faith in the express representations of the Government's agents that they were acquiring the title to the very property now sought to be wrested from them through an appeal to a court of conscience.

The enormity of this pretension is increased by the fact that the suit is brought at a time when, in the nature of things, these appellants stand stripped by the ravages of time of the means of showing to a court the evidence by which their long acknowledged rights may be justified and sustained.

We respectfully submit, however, that after this lapse of time the long continued possession of appellants is evidence in their favor and in support of their equities.

The Fair and Equal Division was by Matter in Pais.

The history of the transactions between the original proprietors and the Commissioners, and between the Commissioners and purchasers, so far as the same are ascertainable at this time, shows that they were most informally conducted, and rest almost wholly in matters *in pais*, impossible of exact ascertainment at this time, while the most important and controlling evidence is the contemporaneous understanding of the parties, by which the possession and right of riparian privileges passed at once to and was exercised only by owners or purchasers of lots or squares facing the river.

The trust deed, on its face, contemplates that the "fair and equal division" to be made, should be made by matter *in pais* between the proprietors and the Commissioners, because it provides no plan of division except in the event that "no other mode of division *shall be agreed on by consent* of the said Notley Young and the Commissioners." As a matter of fact the property was divided by consent.

It is inconceivable that Young could have consented to an arrangement as being "fair and equal," which would have given to the United States the entire water front of the city.

If the United States had at that time been the acknowledged owner of a street in fee along the river shore, and by consequence, the owner of the water front and its riparian privileges, they could have disposed of that street and water front to private persons, according to the express ruling of this court, which has held that—

> "Notley Young and the successor to his title had no property in the street, *not even the right to insist that it should be maintained as such.* The United States held its title to the land over which it was laid out, *for its own use, and not in trust for any person,* OR FOR ANY PURPOSE."

If this proposition is to be taken without qualification, there was nothing to prevent the United States from annexing the street to the squares allotted to it in the division, thereby greatly increasing their value, and selling that part of the street in front of Young's squares to private persons for private purposes, thereby not only depriving him of any water front, but even of an outlet from his land to the street, and thus practically destroying not only the fairness and equality of the division, but also destroying nearly all value of the land allotted him, a proposition at once so inequitable as to be intolerable.

So the Commissioners could, as they in fact did, sell the

squares allotted to the United States with the riparian privileges, at a higher price by reason of that supposed privilege.

While it is quite clear that by the terms of the trust deed absolute power was given the President to lay out streets and select public reservations according to his pleasure, such power was not intended to be exercised arbitrarily and despotically and in disregard of the rights of the proprietors.

On the contrary, the record of the proceedings of the Commissioners abundantly shows that the proprietors who, like the other citizens of the Province of Maryland, had just emerged from a war directed against the oppressions and aggressions of Government, made no mistake in confiding in the sense of justice of Washington and Adams; but, on the contrary, their views were patiently heard and considerately entertained and in the formation of the city their proper and reasonable requests were acceded to as far as equity and justice to all would permit. And whatever the details of those proceedings and agreements, now forever lost by this great lapse of time, the contemporaneous result was that they took, openly and with public declaration of their right, not resisted by the guardians of the public rights, these riparian privileges, and have retained them for over a century.

The Contemporaneous Understanding of the Parties.

The point of view from which the court approached the consideration of the evidence of contemporaneous understanding, and transactions in 109 U. S., must be entirely changed, if it appears that instead of having a definite certain legal title to Water street, or the strip of land intervening between the squares and the river the United States is forced to rely itself on matters *in pais* in order to establish any right in this street or strip.

In those cases the court considered the evidence of contemporaneous understanding and transactions insufficient to overcome a presumption of law as to riparian rights attaching to a shore of which the United States had become absolute owner. If in this case, on this record, that position be untenable, then the evidence of contemporaneous understandings sheds a flood of light upon the intervening history and present situation of the water front.

It is quite true that before 1797 the subject of a water street had been agitated and discussed, though it was not named or designated as a street even on the Engraved Plan. There is overwhelming evidence that the Commissioners, the original proprietors and the public generally were all agreed that the question whether or not a water street should intervene, was absolutely unimportant to riparian rights, and the right of wharfing, as in any event, Water street was to be a street, not a reservation; was to be a public convenience, not a piece of land which should not only interrupt the enjoyment of the private owners fronting the river, but draw to itself valuable rights never intended by the deed in trust to be conveyed as appurtenant to a street, for which no other consideration than its use was accorded. On the contrary the clear understanding in all contemporaneous transactions between Notley Young and the Commissioners, and Morris and Greenleaf, and others, was that where a street intervened between water property and the water, this did not interrupt the right of wharfing. It is not extraordinary, therefore, that Notley Young signed the plats which mentioned Water street when said street was not mentioned uponany plan of the city.

It may be that Notley Young was one of those who thought Water street would be an advantage; but he never could have considered it such if he had not relied upon the understanding with the Commissioners that it was not to interrupt, but to facilitate the enjoyment of his valuable rights on the river front.

The first time the question of the map of the city and Water street was before the President, after the approval of the Dermott map, was in 1799, when Attorney General Lee, on January 7, made clear that the Dermott plan, approved by the President, was the final plan of the city. This had no Water street laid off on it on Notley Young's land, but showed a condition of things making it impossible that there should be a Water street without the reclaiming of land from the water. The Attorney General advises against such a public expenditure and says distinctly that—

> "The laying off of Water street, when done in part or in whole, will stand in need of the sanction of the President."

To imagine that anybody, public or private, would have tolerated the suggestion at that day that the United States was to absorb without consideration the whole of the water front with all its privileges is inconsistent with everything we know of the time and conditions and with the local law, common and statute, of the State of Maryland, expressly adopted by Congress.

The States of Maryland and Virginia, when they made a compact, thought their citizens' privilege of wharfing important enough to make it a part of their joint, solemn, public act. The State of Maryland, after carefully reserving all private rights in its cession when it came under due authority to make public regulations with reference to certain matters in the District, in the Cession act of 1791 (Sec. XII), addressed itself to the subject of wharfing in the city of Washington, and forbade the licensing of any wharf to be built in front of the lands of another.

The Commissioners of the United States, when they came to make regulations for building in the new Federal city, made a comprehensive regulation with reference to wharfing, which was approved by the President.

This was during the very time that the plan of the city and the water lots and the like were being discussed. The plan which the President approved in 1797 appears to have been sent to him by the Commissioners, and it is not conceivable that if he or they had considered that the proposed Water street had annexed to it such valuable privileges as have been set up and countenanced for the street in these modern times they would have permitted it to be left off the Dermott map.

The truth is that the whole matter of Water street was treated by all concerned just as Attorney General Lee in his opinion in 1799 treated it—not as a *matter of title* to affect in any way riparian privileges but as *a matter of future municipal improvement*; and such in fact has been the history of Water street. And the matter of water lots, riparian rights and wharfing were all treated as matters of private property—whether they fell to the purchasers from the public or remained to the original proprietors.

The District was carved out of two settled colonies, with laws and usages, lawyers and freemen, alert, as their ancestors had been, to the claims and protection of private rights. There is nothing in the proceedings or the correspondence of the President or the Commissioners to show any pretense of sovereign right in the execution of the trust deeds, but only the plain, firm holding to the terms of the contract.

The laws of Maryland were fixed and the dealings were with reference to those. Those laws were expressly recognized by Congress as in force, without exception. If we are to consider, as Judge Story says we must, that the controlling and leading idea was to found a city, it was such a city as the people concerned knew and were familiar with; and it was a Federal city and the Federal Government had the right to reserve on the water front, as elsewhere, what the President chose to designate; and in the

final map it did reserve its Navy Yard, its Arsenal, its Monument grounds, its Observatory and the like.

There is nothing in the record to show that either the Commissioners, or General Washington, or anybody connected with the establishment of the city, ever contemplated the ownership by the Government of the whole water front.

Contemporaneous Transactions Recognizing Private Rights of Wharfing.

Water street was never considered but as projected municipal improvement, calculated to benefit the health and commerce of the city, and it was never finally sanctioned as a street even by municipal improvement except in connection with a scheme for the apportionment of the wharfing rights and riparian privileges, which from its fairness and equality was satisfactory to the private owners, agreeable to the spirit of the deeds in trust and the proceedings and possessions thereunder; and this was acted on and taken advantage of by the adjoining proprietors so as in fact to dedicate the street, and by the United States so as to fully admit the private right of wharfing, which had never been questioned before or since by it until this suit was brought, and Congress has clothed this court with express power to confirm this right if in equity and good conscience it ought to be confirmed.

As evidence of the manner in which the subject was treated by the Commissioners and the proprietors, it is to be noted that on page 315, Vol. 6, of the Record, is found an account between Notley Young and the Commissioners, ranging from October, 1794, to March, 1797, in which the "*Water front*" of his property is divided.

Again, on page 306, of Vol. 6, it is stated in Nicholas King's letter of 1803 that—

> "In laying off the city they stopped, as before observed, *on the bank of the river, sold the lots on the*

> *high ground with a water privilege*, without defining what the privilege is or the extent or direction in which the purchasers were to wharf and improve."

Again, in 1799, James R. Dermott, who for seven years was connected with the business of laying off lots, etc., makes the following statements in answer to questions propounded to him by the Commissioners, which questions were evidently inspired by the contemporaneous agitation of Nicholas King as attorney for Peter and others (Vol. 6, p. 216).

> Q 8. (Page 216.) "Were any difficulties ever suggested as to the directions of the wharves or rights of purchasers until the time of Nich. King."
>
> "None that I know of after the first arrangements had taken place in 1793 respecting Carrollsburg, Hamburg and other parts of the City. Sometimes purchasers of *water property* could not at the first view understand their privileges; but when explained to them they were generally satisfied, and *I know of no one closing a bargain until fully convinced of their rights of wharfage.*"

In answering the following question on page 216 namely: "Do you know any instance when the right of wharfage in this city has been so claimed or exercised as to raise a dispute, or is likely to do so," he states, p. 217, after mentioning certain instances as having arisen and been adjusted:

> "The next place where there might be a difficulty was from squares 391 to 472. Had it been in the hands of the Commissioners they might make a provision for it by leaving one or two squares in the internal curve there made without water privileges and then sell the others afterwards, some to have a south privilege of wharfing and some a west one; but Mr. Notley Young claiming this part principally for his improvements and which has since been assigned to him on that account, *it was considered that no difficulty could arise as the whole of that was*

likely to be in his possession and none of it entitled to water privileges by contract but must be by law; therefore he may do as he pleases in selling.

"Q. 7. What portion of *the public water squares, or lots on navigable water*, were sold before the 1st of January, 1798?

"A. The public water property from Squares No. 2 to 10, inclusive. One lot in Square No. 63 was disposed of to different purchasers. *All the public part of that range of water from Square No. 233 to square south of square south of 506 was disposed of to James Greenleaf, in his contract of the 24th of December, 1793.*"

And after mentioning certain other sales of squares on the Eastern Branch he thus concludes:

"This property disposed of I consider to be about one-half of the public water squares in the city of Washington as to quantity and quality. This was disposed of before the 1st of January, 1798."

Reservations as to Notley Young's Buildings, Garden and Graveyard.

It must be remembered that Notley Young owned all the shores of the Potomac River within his tract with exclusive riparian rights.

As to so much of the water front as was within the messuage including Notley Young's mansion, garden and graveyard, this was specifically assured to him by the Commissioners with the single exception of the streets, and was not limited by any description of the squares included in said messuage because the same was assured to him *together with* the squares enumerated. That did not serve to give him any new title but to except something out of his old title, and to provide that all the rest shall *remain to him as original proprietor* in full of the land to be conveyed, together with his buildings and improvements aforesaid, agreeably

to the terms of his deed in trust. (Vol. IV, p. 1991–2; Vol. VI, p. 398 [Map]; Vol. VII, p. 2233.)

The water front covered by Notley Young's home place, exclusive of the width of the streets running out to the water, was about twelve hundred feet. It may well be contended that as to this frontage, which includes Squares 329, 355, 356, 390, 391 and south of 415, Notley Young got an express assurance in accord with the terms of his trust of all the land down to the Potomac River and, of course, of all the riparian rights, because though the trustees never conveyed the streets and public reservations, they did convey to the Commissioners all of the lots and squares subject to division; and they conveyed these expressly subject to the trusts set out in the deed in trust. In the deed in trust there was not only a specific reservation of a privilege to the original proprietor to retain his buildings and the like, but there was also the right to receive *with* the lots to which he should be entitled on the division "any lands not laid out in the city."

As to Notley Young's home tract, of which we are now speaking, streets could only figure as an exception out of a higher title and broader right, and the recognition of a Water street by Notley Young in signing plats of other squares outside of his home place and in accepting the assignment of squares so bounded in the assurance of his home place could not be tortured into anything more than a permission that such a street might be run in the place indicated. But this permission itself must be taken in connection with the circumstances which induced it and the direct representations of the Commissioners who secured it—that it did not interrupt the right of wharfing, which was the principal riparian right considered by anybody.

The Public Policy of Maryland at That Time.

It is not surprising that a matter of this importance should be found to have been dealt with in the informal manner

shown here, and that the proprietors, Commissioners and purchasers should have left such slight evidences of their respective rights. The reason is simple. As said by Mr. Justice Miller in his dissent in the Steamboat Cases, the subject was better understood then than now. There was a well defined public policy of Maryland on the subject.

The policy of the American Colonies was much more liberal than that of England with reference to riparian rights in general and wharfing in particular, and was evidenced by laws and usages adopted to encourage commercial enterprise and activity.

This court, speaking by Mr. Justice Gray, in Shively *vs.* Bowlby, 152 U. S. p. 1, uses the following language:

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or *usages* of the several Colonies and States, or by the Constitution and laws of the United States." (p. 14.)
>
> . . . . . .
>
> "The governments of the several colonies, *with a view to induce persons to erect wharves for the benefit of navigation and commerce*, early allowed the owners of lands bounding on tide waters greater rights and privileges in the shore below high water-mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute *while in others they rested upon usage only.*" (p. 18.)
>
> . . . . . .
>
> "In Maryland, the owner of land bounded by tide water is authorized, according to various statutes beginning in 1745, to build wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved. Casey *vs.* Inloes, 1 Gill. 430; Baltimore *vs.* McKim, 3 Bland, 453; Goodsell *vs.* Lawson, 42 Maryland, 422; Horner *vs.* Pleasants, 66 Maryland, 475; Potomac Steamboat Co. *vs.* Upper Potomac Steamboat Co., 109 U. S. 672,

675,684, in which the question was, who was the riparian owner, and as such entitled to wharf out into the Potomac River in the District of Columbia under the authority to do so expressly conferred under the laws of Maryland in force in the District." (p. 23.)

At the foundation of the City of Washington the Maryland Assembly, in the Act of Cession, authorized the regulation of this *acknowledged private right of wharfing* in the following language:

> "That the Commissioners aforesaid for the time being, or any two of them, shall, from time to time, until Congress shall exercise the jurisdiction and government within the said territory, have power to license the building of wharfs in the waters of Potomac and The Eastern Branch, adjoining the said city, of the materials, in the manner, and of the extent, they may judge durable, convenient, and agreeing with general order; *but no license shall be granted to one to build a wharf before the land of another*, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance."
>
> Sec. 12 of Maryland Act of December 19, 1791. Kilty's Laws, Md. Ch. 45.

In pursuance of this authority the Commissioners made the following regulations respecting wharves. Rec., Vol. 7, p. 2230.

> "The Board of Commissioners in Virtue of the powers vested in them by the Act of the Maryland Legislature to license the building of wharves in the City of Washington, and to regulate the materials, the manner and the extent thereof, hereby make known the following regulations:
>
> "That the proprietors of Water Lots are permitted to wharf and build as far out into the River Potomac and the Eastern branch as they think convenient and proper, not injuring or interrupting the Channels, or

navigation of the said waters, leaving a space wherever the general plan of Streets in the City requires it, of equal breadth with those Streets, which if made by an individual holding the adjacent property shall be subject to his separate occupation and use, until the public shall reimburse the expense of making such street; And where no street or streets intersect said Wharf to leave a space of sixty feet for a Street at the termination of every three hundred feet of made ground. The buildings on said Wharves to be subject to the general regulations for buildings in the City of Washington as declared by the President.

"Wharves to be built of such materials as the proprietors may elect.

"Signed by order,

"Th. Johnson, Jr.

"July 20, 1795."

These regulations were approved by the President in the following letter (Rec. Vol. 6, p. 288):

"Mt. Vernon, 18 September, 1795.

"Gentlemen:

"The copy of the letter which you wrote to the Secretary of State on the 21 ult., enclosing regulations relative to the wharves and buildings in the Federal city, came to my hand yesterday.

"*If the proprietors of water lots will be satisfied with the rules therein established* for the extension of wharves and buildings thereon, the regulations will meet my entire approbation, and of their ideas on this head you have no doubt made some inquiries and decided accordingly. . . .

"With respect, I am, Gentlemen, &c.,

"GEO. WASHINGTON."

The Maryland Act of 1745, Chap. 9, Sec. 10, had enacted as to Baltimore, that all improvements of what kind soever, either wharves, houses or other buildings, that have or shall be made out of the water or where it usually flows (*as an encouragement to such improvers*), be forever decreed the right,

title and inheritance of such improvers, their heirs and assigns forever. 1 Kilty.

This was as to a city already laid out.

In the city of Georgetown, *already laid out*, as early as 1784, the proprietors of lands along the Potomac dedicated to the public, a highway on the river bank to be known as Water street, but reserved the privilege of wharfage to the lots lying on the land side of said street, and as to this city, *already laid out*, the Maryland Act of January 22, 1785, confirmed the same by law.

Again by the Maryland Act of 1796, Chap. 45, similar provisions were made with reference to proprietors on the water front of Baltimore.

Now, as already shown in 1791, in the absence of legislation by Congress and in pursuance of the spirit of that clause of the trust deed which made the said lands subject to the building regulations to be made, *and before any city was laid out*, the twelfth section of the act of 1791, was passed by the Maryland Assembly.

On July 20, 1795, the Commissioners passed their regulation with regard to wharves which recognized an unlimited private privilege of wharfing, but regulated the same and regulated it with reference to the possible requirements for streets yet to be laid out. This regulation was approved by the President, who in his letter (Vol. 6, p. 288), shows his solicitude that the same may be satisfactory to the owners of water lots.

To recognize the *right of wharfing* itself as distinguished from regulating the *method of exercising the right* no law of Maryland was necessary.

The trust deed had provided for the manner of laying out the city, and the same President who approved the wharfing regulations was to fix the plan of the Federal city with such streets as he approved; and when it is considered that in the interval all the squares nearest the river which fell to the public in Notley Young's land had been sold to Morris and Greenleaf *as water lots*; that

the very division with Notley Young had taken place with reference to the *water frontage* of his property, and that Notley Young himself had been licensed to build a wharf in pursuance of the regulations approved by the President, it is preposterous to suggest that the subsequent approval of a street by the President (if any such was ever so approved) was to defeat the right which had been recognized in the division with the original proprietor by the Commissioners acting for the United States, and in the sales to Morris and Greenleaf, who purchased the squares allotted to the public in Notley Young's water front, "*and of course the privileges of wharfing annexed thereto.*"

The Property of Edward M. Willis, successor in title of Arsenius I. Harvey.

The case of this appellant in a single feature differs materially from those of the other appellants named in this brief. The point of difference is that no Water street or other street does in fact exist or ever has existed between the square (southeast of 267) and the river. A particular description of this land is given in the answer of Harvey (Vol. I, p. 239–242) and the amended answer (Vol. I, p. 246), to which is attached a plat (Vol. I, p. 248) showing its exact situation and the boundaries thereof. The square is shown on the Dermott map (Vol. V, 118) being the last block on the south side of Maryland avenue and adjoining the river, by which it is in part submerged.

Though Water street now exists as a regular thoroughfare from the Arsenal grounds up to Thirteen-and-a-half street, it has never in fact been extended beyond that point. It is not contended that if, by the legitimate execution of the trusts in the deed to Beall and Gantt, the United States became vested with title to the water in front of this square that any failure to occupy or use it could have any legal consequences to the complainant in this case. But the important fact is that, by the only lawful plan of the city,

this square was laid out as in part submerged by the tide-waters of the Potomac River without a pretense of a street between it and the water.

By no act of the Government or of parties has a street ever been in fact interposed upon the land since reclaimed from the river, and as a consequence there is neither by the lawful plan, by taking, or by voluntary dedication or otherwise, any street between this square and the river.

Moreover, the only firm land now existing between the original line of the square under water and the present shore of the river is due to alluvion, and the acts of the appellant or those under whom he claims, while the possession of the entire area from the time of Notley Young to the present has been continuous and unbroken.

Under these circumstances, if, as is confidently insisted, no title passed to the United States to any land (of which there was none in fact) between this square and the river, it will become unnecessary to consider as to this appellant what, if any, effect the subsequent actual construction and maintenance of Water street could have, as the property claimed by him is wholly unaffected thereby, no street having as yet been placed through said land.

CONCLUSION.

It is respectfully submitted that the decree below must be reversed as to these appellants, and that every consideration of law and equity, right and justice, requires this court, in the light of this record, to exercise the power conferred by the special act authorizing this proceeding, and to *confirm* by its own decree the claims of these appellants.

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